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32

REPORTS
OF
THE DECISIONS OF THE
COURT OF APPEALS
OF THE
STATE OF COLORADO,

INCLUDING CASES DETERMINED AT THE JANUARY, APRIL
AND SEPTEMBER TERMS, 1892.

T. M. ROBINSON,
REPORTER.

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JUDGES OF THE COURT OF APPEALS
OF THE
STATE OF COLORADO.

GEORGE Q. RICHMOND, PRESIDENT JUDGE.

JULIUS B. BISSELL,
GILBERT B. REED, } **JUDGES.**

JOSEPH H. MAUPIN, ATTORNEY-GENERAL.

JAMES PERCHARD, CLERK.

T. M. ROBINSON, REPORTER.

TABLE OF CASES REPORTED.

A.		Page			Page
Arthur, Union Pacific Ry. Co.			City of Denver v. Soloman,..		534
v.....		159	Clark, Stevenson v.....		108
Atchison T. & S. F. R. R. Co.			Cleghorn, Felt v.....		4
v. City of Denver,.....		436	Collier & Cleveland L. Co. v.		
Atlas Lumber Co. v. Schenck,		246	Henderson,.....		251
B.			Colorado Midland Ry. Co. v.		
Baker, Carson v.....		248	Ruedi,.....		202
Baker v. Riley,.....		478	Colorado Nat. Bank, Hill v...		324
Beck, Leppel v.....		390	Colorado Soap Co. v. Burns,..		89
Best, Catlin Land & C. Co. v.		481	Colorado Springs Live S. Co.		
Bice v. Hover,		172	v. Godding,.....		1
Board of Com. v. Locke,.....		508	Comrs. of Gunnison Co. v.		
Bohm v. Hoffer,.....		146	Comrs. of Saguache Co.,...		412
Boulder Investment Co. v.			Comrs. of Pitkin Co. v. Brown,		473
Fries,		373	Cooper, Howell v.....		530
Brewster v. Crossland,.....		446	Cornwell, Western U. T. Co.		
Brind, Mattler v.....		439	v.....		491
Brown, Com. of Pitkin Co. v..		473	Crawford, etc., Brown v.....		235
Brown v. Crawford,.....		235	Crossland, Brewster v.....		446
Brown v. Hunter,		527	D.		
Buno v. Gabriel,.....		295	Davis v. Graham,.....		210
Burns, Colo. Soap Co. v.....		89	Davis v. John Mouat Lumber		
Bush v. Koll,.....		48	Co.,.....		381
C.			Denver City Ry. Co. v. City of		
Campbell, First Nat. Bank of			Denver,.....		34
Denver v.....		271	Denver & R. G. Ry. Co. v.		
Capital Nat. Bank, Woolman			Davidson,		443
v.....		454	Denver & R. G. Ry. Co., Low-		
Carlton, Sioux City Nursery,			enbruck v.. ..		323
etc., Co. v.....		157	Denver & R. G. Ry. Co., Mow-		
Carson v. Baker,.....		248	bray v.....		128
Carson, Steves v.....		200	Denver & R. G. Ry. Co. v.		
Carson, Steves v.....		202	Outcalt,,		395
Catlin Land & C. Co. v. Best,		481	Denver, Texas & F. W. R. R.		
Childs v. Lowenbruck,.....		92	Co. v. Richards,.....		87
City of Denver, Atchison T. &			Denver, Texas & F. W. R. R.		
S. F. R. R. Co. v.....		436	Co. v. Smeeton,...		126
City of Denver, Denver City			Denver, Texas & Gulf R. R.		
Ry. Co. v.....		34	Co. v. DeGraff,.		42
			Denver, Texas & Gulf R. R.		
			Co. v. Robbins,.....		313
			Diebold, etc., Co., Weber v..		68

	Page		Page
Dolores, etc. Canal Co., Robinson v.....	17	Hauptman, Rice v.....	565
Dowling v. Dowling,.....	28	Helland, Myer v.....	209
Drennon v. Ross,.....	182	Heller v. The People,.....	459
Dunn, Reddin v.....	518	Henderson v. Glynn,.....	303
		Henderson v. The C. & C. Lithographing Co.,.....	251
E.		Higgins v. The People,....	567
Edwards v. Harvey,.....	109	Hill v. Colo. Nat. Bank,.....	324
Elliott v. Hobbs,.....	169	Hobbs, Elliott v.....	169
Elliott v. First Nat. Bank,....	164	Hoffer, Bohm v.....	146
Equitable F. & M. Ins. Co., Wich v.....	484	Hover, Bice v.....	172
		Howell v. Cooper,.....	530
F.		Hummel v. First Nat. Bank,..	571
Farmers' & M. Ins. Co. v. Nixon,.....	265	Hunter, Brown v.....	527
Farris v. Walter,.....	450	Hyde, Tanner v.....	443
Felt v. Cleghorn,.....	4		
Ferguson v. Owl Canon G. Co.,.....	219	J.	
First Nat. Bank v. Campbell, ..	271	Jacobs v. Mitchell,.....	456
First Nat. Bank v. Elliott,....	164	Jessup, Whitehead v.....	76
First Nat. Bank v. Hummel, ..	571	John Mouat L. Co., Davis v..	381
Fisher, Metcalf v.....	375	Jones v. Montrose Mercantile Co.,.....	94
Fraser, Victoria Gold, etc., Co. v.....	14	Justice Mining Co., Lee v.....	112
Fries, Boulder Investment Co. v.....	373		
		K.	
G.		Koll, Bush v.....	48
Gabriel, Buno v.....	295		
Gatlin, Rhoads v.....	96	L.	
Glynn, Henderson v.....	303	Landt v. Major,.....	551
Goard v. Gunn,.....	66	Latcham, Greene v.....	416
Godding, Colo. Spgs. L. S. Co. v.....	1	Lee v. Justice Mining Co.,....	112
Goebner, Winter v.....	259	Lee, Mayor etc., Platte & Denver C. & M. Co. v.....	184
Gomer v. McPhee,.....	287	Leer, Sullivan v.....	141
Goodwin, Rice v.....	267	Leppel v. Beck,.....	390
Graham, Davis v.....	210	Lighthall v. Moore,.....	554
Greene v. Latcham,.....	416	Locke, Board of Co. Commissioners v.....	508
		Lowenbruck, Childs v.....	92
H.		Lowenbruck v. Denver & R. G. R. R. Co.,.....	323
Hagerman v. Moore,.....	83	Lusk v. Patterson,.....	306
Hamill, Tribune Pub. Co. v... ..	237		
Hanson, Morris v.....	154	M.	
Harper v. The People,.....	177	Madeley v. White,.....	408
Harrison, Hillsburg v.....	298	Major, Landt v.....	551
Harvey, Edwards v.....	109	Mattler v. Brind,.....	439
		Metcalf v. Fisher,.....	375
		Metcalf v. The People,.....	262

TABLE OF CASES REPORTED.

vii

	Page	R.	Page
Meyer v. Helland,.....	209	Rawles v. The People,.....	501
Mitchell, Jacobs v.....	456	Raymond v. The People,.....	329
Moore, Hagerman v.....	83	Reddin v. Dunn,.....	518
Moore, Lighthall v.....	554	Reddington v. Reddington,...	8
Montrose Mercantile Co.,		Reeves v. The People,....	196
Jones v.....	94	Rhoades v. Gatlin,.....	96
Morris v. Hanson,.....	154	Rhodes, Phillips v.....	70
Mowbray v. Denver & R. G.		Rice v. Goodwin,.	267
R. R. Co.,.....	128	Rice v. Hauptman,.....	565
		Richards, Denver, Texas & F.	
Mc.		W. R. R. Co. v.	87
McCarthy, Palmer v.....	422	Riley, Baker v.....	478
McLaughlin v. Thompson,...	135	Robbins, Denver T. & G. R.	
McPhee, Gomer v.....	287	R. Co. v.....	313
		Robinson v. Dolores, etc.,	
N.		Canal Co.....	17
Nixon, The Farmers & M. Ins.		Ross, Drennon v.....	182
Co. v.....	265	Ruedi, Colorado Midland Ry.	
		Co. v.....	202
O.			
Outcalt, Denver & R. G. Ry.		S.	
Co. v.....	395	Schenck, The Atlas Lumber	
Owl Canon Gypsum Co. v.		Co. v.....	246
Ferguson,.....	219	Sioux City Nursery, etc., Co.	
		v. Carlton,.....	157
P.		Smeeton, Denver, Texas & F.	
Palmer v. McCarthy,.....	422	W. R. R. Co. v.....	126
Park, Westman Mercantile Co.		Smith v. The People,.....	99
v.....	545	Soloman, City of Denver v...	534
Patterson, Lusk v.....	306	Stevenson v. Clark,.....	108
Peoples Nat. Bank, Woodward		Steves v. Carson,.....	200, 202
v.....	369	Sullivan v. Leer,.....	141
People, Harper v.....	177		
People, Heller v.....	459	T.	
People, Higgins v.....	567	Tanner v. Hyde,.....	443
People, Metcalf v.. . . .	262	Taylor v. Williams,.....	559
People, Rawles v.....	501	Thomas v. The People,.....	513
People, Raymond v.....	329	Thompson, McLaughlin v.....	135
People, Reeves v.....	196	Town of Gunnison, Warner v.	430
People, Smith v.....	99	Tribune Publishing Co. v. Ha-	
People, Thomas v.....	513	mill,	237
People, Tynon v.....	131	Tynon, The People v.....	131
Perkins v. Peterson,. . . .	242		
Peterson, Perkins v.....	242	U.	
Petty, Webber v.....	63	Union Pacific Ry. Co. v. Ar-	
Phillips v. Rhodes,.....	70	thur,	159
Platte & Denver C. & M. Co.			
v. Lee, Mayor,.....	184	V.	
Pogue, Walker v.....	149	Victoria Gold, etc., Co. v.	
		Fraser,.....	14

TABLE OF CASES REPORTED.

W.		Page		Page
Walker v. Pogue,.....		149	Whitehead v. Jessup,.....	76
Walter, Farris v.....		450	Wich v. Equitable F. & M. Ins.	
Warner v. Town of Gunnison,		430	Co.,.....	484
Webber v. Petty,.....		63	Williams, Taylor v.....	559
Weber v. Diebold, etc., Co.,..		68	Winter v. Goebner,.....	259
Western U. T. Co. v. Corn-			Woodward v. Peoples Nat.	
well,.....		491	Bank,.....	369
Westman Mercantile Co. v.			Woolman v. Capital Nat.	
Park,		545	Bank,.....	454
White, Madeley v.....		408		

LIST OF CASES CITED.

A.		Page		Page
Abbey v. Deyo, 44 N. Y. 343,...	128	Barnum v. State, 15 Oh. St. 717,.	344	
Ackley Ex. v. Parmenter, 98 N. Y. 425,.....	420	Barrett v. Churchill, 18 B. Mon. 387,.....	529	
Adair v. Winchester, 7 Gill & J. 114,.	143	Bassic Mining Co. v. Schoolfield, 15 Colo. 376,.....	528	
Adams v. Adams, 17 N. J. Eq. 324,.....	18	Bassinger v. Spangler, 9 Colo. 175,.....	67	
Allen v. Webb, 64 Ills. 342,.....	261	Bates v. Donnelly, 57 Mich. 521,.	420	
Allerton v. Chicago, 9 Biss. (U. S. C. C.) 552,.....	40	Bates v. Varney, 40 Ala. 441,...	311	
Alvord v. McGaughey, 5 Colo. 244,.....	86	Baur v. Beall, 14 Colo. 383,.....	67	
Ames Case, 2 Greenl. 365,.....	361	Bayerque v. City of San Francisco, 1 McAll. 175,.....	359	
Anderson v. Smythe, 1 Colo. Ct. Ap. 253,.....	233	Bearing v. Erdman, Haz. Pa. Reg.,.....	433	
Armstrong v. Abbott, 11 Colo. 220,.....	279, 285	Belk v. Meagher, 104 U. S. 279,.	125	
Armstrong v. Morrill, 14 Wall. 138,.....	171	Bennett v. Bradford, 132 Ills. 269,.....	312	
Arnold v. Bright, 41 Mich. 210,.	107	Billenburg v. Mont. N. R. Co., 8 Mont. 271,.....	405	
Atchison v. Graham, 14 Colo. 217,.....	168	Billman v. Ind. etc. R. R. Co., 76 Ind. 166,.....	316, 319, 321	
A. T. & S. F. R. R. Co. v. Nichols, 8 Colo. 189,	452	Birchell v. Neaster, 36 Ohio St. 331,.....	420	
Auditors v. Benoit, 20 Mich. 176,.	306	Bliss v. Clark, 39 Ills. 590,.....	372	
Ayers v. Hartford F. Ins. Co., 17 Ia. 176,.....	487	Bloom v. McGehee, 38 Ark. 329,.	302	
		Bloomer v. Laine, 10 Wend. 525,.	504	
		Blythe v. Denver & R. G. Ry. Co., 15 Colo. 333,.....	317	
		Board v. Arles, 15 Tex. 72,.....	533	
		Board etc. v. Bakewell, 122 Ills. 340,.....	405	
		Board of Com. of Pitkin Co. v. Aspen M. & S. Co., 1 Colo. Ct. Ap. 125,.....	109, 324	
		Board v. Hendrick, 20 Tex. 60,.	533	
		Bock v. Perkins, 28 Fed. Rep. 123,.....	428	
		Bohm v. Bohm, 9 Colo. 100,....	154	
		Bohanon v. Howe, 17 Pac. Rep. 583,.....	120	
		Bonebright v. Pease, 3 Mich. 318,.....	143	
		Bonnell v. Esterly, 30 Wis. 549,.	105	
		Boos v. The World M. L. Ins. Co., 64 N. Y. 236,.....	490	
		Booth v. Tyson, 15 Vt. 515,....	292	
		Borders v. Murphy, 73 Ills. 81,...	530	
		Born v. Shaw, 29 Pa. St. 288,...	180	

	Page		Page
Bowker v. Hoyt, 18 Pick. 555,...	292	City of Denver v. Mullen, 7 Colo.	
Boykin v. Cook, 61 Ala. 472,...	529	346,.....	192
Bradbury v. Davis, 5 Colo. 265,.	154	City of Leavenworth v. Rankin,	
Brand v. Merritt, 15 Colo. 286,.	224	2 Kas. 357,.....	341
Braunstein v. Ins. Co., 1 E. & S.		City of London v. Nash, 1 Ves.	
783,.....	62	13,.....	143
Breeze v. Haley, 10 Colo. 5,....	380	Claffin v. Doggett, 3 Colo. 413,.	506
Briggs v. Taylor, 28 Vt. 183,.	540, 541	Clare v. The People, 9 Colo. 122,	464
Brightman v. Hicks, 108 Mass.		Clark v. Rice, 46 Mich. 308,....	62
246,.....	419	Clarke v. State, 8 Oh. St. 630,...	344
Brown v. Commercial F. Ins.		Clement v. Major, 1 Colo. Ct. Ap.	
Co., 86 Ala. 189,.....	488	297,.....	79
Brown v. Foster, 113 Mass. 136,.	53	Clowes v. Higginson, 1 V. & B.	
Brown v. Willoughby, 5 Colo. 1,.	79	527,.....	143
Browne v. Moore, 61 Cal. 432,...	108	Coates Case, 1 Ld. Ray. 449,....	835
Bruce v. Coleman, 1 Handy, 515,	440	Cobb v. Buswell, 37 Vt. 337,....	180
Bryan v. Cattell, 15 Ia. 583,....	532	Coghill v. Marks, 29 Cal. 673,...	395
Buerfenning v. Buerfenning, 23		Cole v. Swanson, 1 Cal. 51,....	292
Minn. 563,.....	10	Colo. Central R. R. Co. v. Allen,	
Burgwin v. Babcock, 11 Ills. 28,.	456	13 Colo. 229,.....	436
Burham's Case, 8 Coke, 1183,...	400	Colo. M. Ry. Co. v. Croman, 16	
Burke v. Jeffries, 20 Ia. 145,...	270	Colo. 296,.....	201
Burritt v. Com'rs, 120 Ills. 322,.	257	Com. v. Costello, 120 Mass. 358,	361
Burns v. Ledbetter, 56 Tex. 282,.	529	Commissioners v. Anderson, 20	
Burton v. Caryea, 40 Ills. 320,...	327	Kas. 298,...	306
Burton v. Goodspeed, 69 Ill. 237,	91	Commissioners of Park Co. v.	
Butman v. Porter, 100 Mass. 337,	261	Locke, 2 Colo. Ct. Ap. 508,...	475
C.		Commissioners v. Wilson, 15	
Cairo & F. R. R. v. Parks, 32		Colo. 90,.....	380
Ark. 131,.....	405	Conant v. Conant, 10 Cal. 250,	13
Calder v. Bull, 3 Dall. 386,....	407	Coogan's Case, 1 Leach. 449,...	355
California Ins. Co. v. Gracey, 15		Cook v. Mann, 6 Colo. 21,.....	567
Colo. 70,.....	241, 488	Cook v. Pendergast, 61 Cal. 72,.	105
Callahan v. Jennings, 16 Colo.		Coombs v. Parrish, 6 Colo. 296,.	201
472,.....	466	Cooper v. McKeen, 11 Colo. 41,.	242
Campbell v. Polk Co., 3 Ia. 467,	342	Cooper v. People ex. rel. Wyatt,	
Candee v. Western U. Tel. Co.,		13 Colo. 337,.....	199
34 Wis. 471,.....	497	Correll v. The B. C. R. & M. R.	
Cape May & S. R. R. Co. v. City		R. Co., 38 Ia. 120,.....	317
of Cape May, 35 N. J. Eq. 409,	193	Craig v. Kline, 65 Pa. St. 413,...	405
Carpenter v. City of Oakland, 30		Craig v. Leitensdorfer, 123 U. S.	
Cal. 439,.....	154	189,.....	125
Carr v. Caldwell, 10 Cal. 380,...	311	Crain v. Petrie, 6 Hill (N. Y.)	
Carroll v. Charter Oak Ins. Co.,		522,.....	497
40 Barb. 252,.....	267	Crane v. Reeder, 22 Mich. 322,.	270
Carlisle v. Pullman Co., 8 Colo.		Crooke's Case, 2 Strange, 901,...	355
327,.....	39	Crape v. Kelley, 16 Wall. 610,...	180
Catlin v. Henton, 9 Wis. 496,...	558	Crawfordsville v. Smith, 79 Ind.	
Chandler v. Lincoln, 52 Ills. 75,	6	308,.....	322
Chicago v. O'Brennan, 65 Ills.		Cunningham v. People, 11 N. Y.	
160,.....	545	(S. C.) 455,.....	344
Churchill v. Abraham, 22 Ills.		D.	
455,.....	440	Daggett v. Johnson, 49 Vt. 345,	62
City of Atchison v. Jansen, 21		Dallas v. Redman, 10 Colo. 300,	464
Kas. 560,.....	236	Daniels v. Lewis, 7 Colo. 420,...	506
City of Denver v. Knowles, 17		Dartmouth College v. Wood-	
Colo. 204,.....	42	ward, 4 Wheat. 519,.....	401

xi

E.

	Page		Page
Glidden v. Hopkins, 47 Ill.	525,, 338	Horn v. Reitler, 15 Colo.	317,
Golden Fleece v. Cable Con. Co.,			242, 569
12 Nev.	312,, 119	Horr v. Barker, 8 Cal.	603,, 327
Gordon v. Norris, 49 N. H.	376,, 3	Hough v. City Fire Ins. Co.,	29
Gray v. Palmer, 9 Cal.	639,, 311	Conn.	10,, 489
Great West. M. Co. v. Woodmas etc. Co., 14 Colo.	90,, 140	Hough v. R. R. Co., 100 U. S.	
Green v. Briggs, 1 Curtis C. C.		213,, 215	
311,, 402		Houseman v. Girard etc. Ass'n,	
Green v. Marks, 25 Ills.	221,, 372	81 Pa. St.	256,, 285
Green v. Taney, 16 Colo.	398,, 32	Howe v. Hutchinson, 105 Ills.	
Greenwood Cem. Co. v. Routt,		501,, 564	
17 Colo.	156,, 532	Howell v. State, 37 Tex.	591,, 346
Gregg v. James, 12 Am. D.	151	Hughes v. Cummings, 7 Colo.	
(Breese, 143), 456		203,, 506	
Gridley v. Bloomington, 68 Ills.		Hurtado v. California, 110 U. S.	
47,, 545		536,, 401, 405	
Griffin v. Clover, 16 N. Y.	489,, 497	Hutchinson v. Laughlin, 15 Colo.	
Griffith v. Frederick Co. Bank,		492,, 311	
6 Gill & J.	424,, 261		
Grover v. Wakeman, 11 Wend.		I.	
(N. Y.)	187,, 428	Ingalls v. Eaton, 25 Mich.	32,, 553
Gurnee v. Maloney, 38 Cal.	87,, 311	In re Gardner, 68 N. Y.	467,, 305
		In re Lowrie, 8 Colo.	499,, 401
H.		In re U. S. Ser. Co., 6 L. R. Chy.	
Hadley v. Baxendale, 9 Exch.		Ap. Cas.	212,, 499
341,, 495		Insurance Co. v. Adams, 9 Pet.	
Hagerman v. Moore, 2 Colo. Ct.		573,, 533	
Ap.	83,, 130	Ins. Co. v. Fermell, 49 Ill.	180,, 267
Haines v. Haines, 35 Mich.	143,, 108	Ins. Co. v. Wallis, 23 Md.	182,, 428
Hall v. Tittabawassee Boom Co.,		Ins. Co. v. Tweed, 7 Wall.	44,
51 Mich.	377,, 802	318, 319	
Handy v. Handy, 124 Mass.	394,, 13	J.	
Harrington v. Wands, 23 Mich.		Jackson v. Weisiger, 2 B. Mon.	
385,, 467		214,, 361	
Harrison v. Farnsworth, 1 Heisk,		James v. Roberts, 18 Oh. St.	548,, 558
752,, 86		Jarnagin v. State, 10 Yerg.	529,, 349
Harrison v. Hastings, 28 Mo.		Jeffreys v. Jeffreys, Craig & Ph.	
346,, 240		138,, 261	
Hauf v. Hauf, 48 Mich.	281,, 13	Jennings v. Gray, 13 Ill.	610,, 69
Haverly v. Mecur, 78 Pa. St.	257,, 420	Jennings v. Joiner, 1 Cold.	695,, 440
Harvey v. Foster, 64 Cal.	296,, 395	Jensen v. U. P. Ry. Co., 21 Pac.	
Hawksworth's Case, 1 Leach,		Rep.	994,, 405
257,, 355		Johns v. Johns, 29 Ga.	718,, 13
Hayden v. Hayden, 46 Cal.	332,, 241	Johnson v. Towsley, 13 Wall.	80,, 121
Heald v. Hendy, 65 Cal.	321,, 105	Joliffe v. Ins. Co., 39 Wis.	117,, 267
Hepburn v. Auld, 5 Cranch,	279, 563	K.	
Herfort v. Cramer, 7 Colo.	483,, 3	Kanaga v. Taylor, 7 Oh. St.	134,, 180
Herndon v. Forney, 4 Ala.	243,, 440	Keeling v. Heard, 3 Head.	592,, 538
Hershfield v. Claffin, 25 Kas.		Kerns v. Flynn, 51 Mich.	573,, 386
166,, 6		Kesler v. Haynes, 6 Wend.	547,, 156
Higgins v. Armstrong, 9 Colo.		Ketchum v. Watson, 24 Ill.	591,, 69
57,, 266		Kleith v. Buck, 16 Ill. Ct. Ap.	
Higgins v. Brown, 6 Colo.	148,, 85	121,, 558	
Higler v. Edwards, 5 Nev.	84,, 302		
Hodgson v. Waldron, 9 N. H.	66,, 302		
Hooker v. Russell, 67 Wis.	257,, 420		

LIST OF CASES CITED.

xiii

	Page		Page
King v. Buttery, 1 Russ. & R. 342,.....	355	Manufacturing Co. v. Morrissey, 40 Oh. St. 148,.....	217
King v. Mayor, 7 Adol. & E. 215,.	305	Marbury v. Madison, 1 Cranch. 137,.....	531
King v. Mayor of Colechester, 2 Term. R. 259,.....	305	Martin v. San Francisco, 16 Cal. 285,.....	340
King v. Mayor of Oxford, 6 Adol. & E. 349,.....	305	May v. Rice, 91 Ind. 546,.....	257
King v. Pateman, Russ. & P. 475,.....	359	Mayor of Baltimore v. Radecke, 49 Md. 218,...	193
King v. Randall, Russ. & R. 195,.	358	Mayor v. Aspen T. & L. Co., 10 Colo. 191,.....	64, 270
King v. Richards, Russ. & R. 193,.....	358	Meesel v. Lyman, 8 Allen, 243,.	541
King v. Ward, 2 Ld. Raym. 1461, 356, 358, 360		Meiners v. Loeb, 64 Wis. 343,...	105
Kings Co. Fire Ins. Co. v. Swigert, 11 Brad. 590,.....	267	Merkel v. Berks Co., 81 Pa. St. 505,.....	335
Kingston v. Towle, 48 N. H. 57,.	405	Miller v. Davis, 50 Mo. 372,....	283
Knot v. The People, 83 Ill. 532,.	198	Miller v. Hallock, 9 Colo. 551,..	234
Krutz v. Stewart, 54 Ind. 178,.	420	Milwaukee etc. Ry. Co. v. Kellogg, 94 U. S. 470,.....	320
L.		Millett v. The People, 117 Ill. 298,.....	405
Lake v. Milliken, 62 Me. 420,...	321	Minturn v. Seymour, 4 Johns. Ch. 497,.....	261
Lambert v. The People, 76 N. Y. 220,.....	306	Montelius v. Atherton, 6 Colo. 224,.....	237
Landsberger v. Mag. Tel. Co., 32 Barb. 530,.....	497	Moore v. Metropolitan Bk., 55 N. Y. 41,.....	184
Langhoff v. Railroad Co., 19 Wis. 516,.....	541	Moore v. Robbins, 96 U. S. 530,.	123
La Rue v. Groezinger, 84 Cal. 281,.....	2	Morgan v. McKee, 77 Pa. St. 228,.	294
Laselle v. Wells, 17 Ind. 33,....	236	Morisi v. Swift, 15 Nev. 215,....	393
Lee v. Stahl, 9 Colo. 208,.....	287	Morris v. Langdale, 2 Bos. & Pull. 284,.....	495
Lee's Case, 1 Leach, 258,.....	355	Morrison v. Barrow, 1 De G. F. & J. 633,.....	261
Lee Doon v. Tesh, 8 Pac. Rep. 621,.	121	Morrissey v. Kinsey, 16 Neb. 17,.	420
Lehigh Valley R. R. Co. v. McKean, 90 Pa. St. 122,.....	321	Morton's Case, 1 Leach, 258,...	365
Lemen v. Robinson, 59 Ill. 115,.	168	Morton v. Morton, 16 Colo. 358,.	387
Littleton v. Richardson, 34 N. H. 179,.....	405	Morton v. Nebraska, 21 Wall. 660,.....	124
Livermore v. Aldrich, 5 Cush. 431,	281	Mowry v. Rosendale, 74 N. Y. 361,.....	488
London etc. v. Limehouse Board etc., 3 Kay. & J. 123,.....	270	Mugler v. Kansas, 123 U. S. 661,.	191
Loomis v. Barker, 69 Ill. 360,...	91	Mulvey v. Carpenter, 78 Ill. 580,.	530
Lord v. Pueblo S. & R. Co., 12 Colo. 390,.....	214	Munsell v. Lowe, 21 Mich. 491,.	261
Lowery v. Manhattan Ry. Co., 99 N. Y. 158,.....	322	Munson v. Porter, 63 Ia. 453,...	302
Lowery v. West. U. Tel. Co., 60 N. Y. 198,.....	498	Murch v. Wright, 46 Ill. 487,....	69
Loveland v. Sears, 4 Colo. 434,.	507	Mumford v. Canty, 50 Ill. 370,..	180
Lusk v. Kershow, 17 Colo. 481,.	312	Mc.	
M.		McClurg v. Lecky, 3 Pen. & W. (Pa.) 83,.....	428
Maccubben v. Cromwell, 7 Gill. & J. 157,.....	172	McCormick v. Hadden, 37 Ill. 370,.....	69
		McCully v. Clark, 40 Pa. St. 399,.	540
		McGrew v. Stone, 53 Pa. St. 440,.	499
		McGruder v. Swann, 25 Md. 173,.	582
		McManus v. City of Brooklyn, 5 N. Y. Supp. 424,.....	306

	Page		Page
McMurtrie v. Riddel, 9 Colo.		People v. Shall, 9 Cow. 778, 343,	359
497,.....	284	People v. Spruance, 8 Colo. 314,	257
McVeany v. Mayor etc., 80 N.		People v. Stearns, 21 Wend. 409,	345
Y. 185,.....	306	People v. Stevens, 5 Hill, 629,...	305
N.		People v. Tomlinson, 35 Cal. 503,	344
Nagle v. Nagle, 12 Mo. 53,.....	13	People v. White, 24 Wend. 540,.	306
North Noonday Min. Co. v. Ori-		People v. Wright, 9 Wend. 193,.	345
ent Mining Co., 1 Fed. Rep.		People ex. rel. v. Henderson, 12	
522,.....	119	Colo. 371,.....	89
O.		Phillips v. Cook, 24 Wend, 389,.	6
Ohio & Miss. R. R. Co. v. Lackey,		Pipe v. Smith, 5 Colo. 146,....	154
78 Ill. 55,.....	405	Piscataqua Bridge Co. v. Ports-	
Oliver v. Robinson, 59 Ala. 46,...	405	mouth Bridge Co., 7 N. H. 35,	405
Opinions of Judges, 41 N. H.		Pitney v. Glenns Falls Ins. Co.,	
551,.....	405	65 N. Y. 6,.....	267
O'Rear v. Lazarus, 8 Colo. 608,.	387	Platte & Denver D. Co. v. Ander-	
Owens v. Owens, 23 N. J. Eq. 60,.	283	son, 8 Colo. 132,.....	192
P.		Porter v. Pico, 55 Cal. 165,...	395
Pace v. Lee, 49 Ala. 571,.....	395	Post v. Aetna Ins. Co., 48 Barb.	
Palmer v. Way, 6 Colo. 110,....	38	357,.....	267
Park Co. v. Jefferson Co., 12		Poyer v. Des Plaines, 123 Ill. 111,	40
Colo. 585,.....	511	Prescott v. Gonser, 34 Ia. 178,...	340
Parker v. Hall, 55 Me. 362,.....	156	Price v. Kramer, 4 Colo. 547, 378,	379
Parsons v. Russell, 11 Mich. 113,	402	Putnam v. How, 39 Minn. 368,.	232
Patterson v. Wallace, McQueen		Putnam v. Ins. Co., 18 Blatch.	
H. L. Cases, 748,.....	541	368,.....	267
Pearce v. Watts, L. R. 20 Eq.		Q.	
492,.....	261	Queen v. Councilors of Derby, 7	
Peck v. Houghtaling, 35 Mich.		Adol. & E. 419,.....	305
127,.....	553	Quimby v. Railroad, 23 Vt. 387,.	541
Peenoyer v. Neff, 95 U. S. 714,...	388	R.	
Pennsylvania v. Wheeling B.		Railroad Co. v. Heilman, 49 Pa.	
Co., 18 How. 421,.....	108	St. 63,.....	541
People v. Bibby, 27 Pac. Rep.		Railroad Co. v. Hope, 30 P. F.	
781,.....	345, 361	Smith, 373,.....	322
People v. Brooks, 16 Cal. 11,....	532	Railroad Co. v. McElwee, 67 Pa.	
People v. Cook, 8 N. Y. 67,....	306	St. 311,.....	541
People v. Detroit, 18 Mich. 338,.	305	Railroad Co. v. Stout, 17 Wall.	
People v. Eades, 68 Mo. 150, 345,	361	657,.....	540, 541
People v. Galloway, 17 Wend.		Railroad Co. v. Van Steinburg,	
540,.....	346	17 Mich. 121,.....	540, 541
People v. Harrison, 8 Barb. 562,		Railway Co. v. Phila., 58 Pa. St.	
347, 361		119,.....	40
People v. Head, 25 Ill. 325,.....	305	Railway Co. v. Phila, 101 U. S.	
People v. Heed, 1 Idaho, 531,		532,.....	40
348, 356		Railway Co. v. Railway Co., 61	
People v. Johnson, 71 Cal. 389,.	469	Mich. 9,.....	107
People v. Mahoney, 13 Mich.		Redmond v. Dickerson, 1 Stock	
481,.....	466	(N. J.) 507,.....	143
People v. Neil, 74 Ill. 68,.....	198	Reed v. Eames, 19 Ill. 594,....	168
People v. Noyce, 86 Cal. 393,....	469	Reese v. Mitchell, 41 Ill. 365,...	168
People v. New York, 3 Johns.		Reeve v. City of Oshkosh, 33	
Cas. 79,.....	305	Wis. 477,.....	340
		Reg. v. Hughes, 7 Cox's C. L.	
		Cases, 301,.....	514

XV.

	Page		Page
Bembert v. State, 53 Ala. 467,...	344	Sheppard v. Sheppard, 1 Md. Ch.	
Rex v. Avery, 8 Car. & P. 506,...	355	244,.....	261
Rex v. Barber, 1 Car. & K. 434,	355	Sherman v. Buick, 93 U. S. 216,	124
Rex v. Burke, Crown Cases		Silver v. Ladd, 7 Wall. 228,....	124
497,.....	343, 359	Sinnickson v. Lynch, 25 N. J. L.	
Rex v. Green, 7 Car. & P. 155,...	514	317,.....	386
Rex v. Lyon, 2 Leach, 597,		Smetzler v. White, 92 U. S. 390,	340
843, 358,	359	Smith v. Aurich, 6 Colo. 388,...	452
Rex v. Moffatt, 1 Leach, 431, 343,	358	Smith v. Bangs, 15 Ill. 339,....	193
Rex v. Richards, Crown Cases,		Smith v. Taylor, 82 Cal. 538,....	564
193,.....	343, 358	Smith & Co. v. McLean, 24 Ia.	
Ribet v. Ribet, 39 Ala. 348,....	13	322,.....	180
Rich v. Lappin, 43 Kas. 666,....	236	Spofford v. Railway Co., 66 Me.	
Richards v. Shaw, 67 Ill. 222,...	291	51,.....	107
Richmond v. Gray, 3 Allen, 25,		Spokes v. Banbury B. of H., L.	
563,	564	R. I. Eq. Cas. 41,.....	108
Ricker v. Freeman, 50 N. H.		Springer v. County of Clay, 35	
420,.....	320	Ia. 243,.....	340
Rigley v. Hewitt, 5 Exch. 240,...	498	Stacy v. Thrasher, 6 How. 44,...	581
Rinear v. Railroad Co., 70 Mich.		Standard etc. Ins. Co. v. Frieden-	
623,.....	408	thal, 1 Colo. Ct. Ap. 5,.....	267
Rio Grande Extension Co. v.		Stark v. Starrs, 6 Wall. 402,....	124
Coby, 7 Colo. 300,.....	183	State v. Bartlett, 55 Me. 200,....	349
Ripley v. Evans, 87 Mich. 217,...	467	State v. Chase, 5 Oh. St. 528,...	532
Rising Sun, etc., Co. v. Conway,		State v. Clark, 52 Mo. 508,.....	306
7 Ind. 187,....	236	State v. Corfield, 26 Pac. Rep. 498,	345
Ristine v. Ristine, 4 Rawle. 460,	10	State v. Coombs, 47 Kas. 136,	
Robinson C. M. Co. v. Johnson,		469,	470
13 Colo. 258,.....	282	State v. Henry, 24 Kas. 457, ...	470
Rollins v. State, 23 Tex. App.		State v. McAnulty, 26 Kas. 533,.	470
548,.....	346	State v. Lucky, 51 Miss. 528,...	504
Roode v. State, 5 Nev. 174,...	344	State v. Potter, 15 Kas. 302,....	236
Ross v. Clarke, 1 Young & Coll.		State v. Smith, 89 Mo. 409,.....	340
534,.....	143	State Ins. Co. v. Taylor, 14 Colo.	
Rounds v. State, 57 Wis. 45,....	349	499,.....	488
Roy v. Goings, 96 Ill. 361,.....	62	Steel v. Sinelting Co., 106 U. S.	
Russell v. Wheeler, Hemp. R. 3,	433	447,.....	123
Rush v. Vought, 55 Pa. St. 437,	128	Steinkamper v. McMannus, 26	
		Mo. App. 51,.....	386
		Steubenville v. Culp, 38 Oh. St.	
		23,.....	306
		Stevens v. The Solid Muldoon	
		P. Co., 7 Colo. 86,.....	86
		Stuart v. Sonneborn, 98 U. S.	
		187,.....	79
		Stirling's Case, 1 Leach, 99, ...	355
		Stirling City M. Co. v. Cock, 2	
		Colo. 24,.....	441
		St. John v. Benedict, 6 John (N.	
		Y.) Ch. 111,.....	143
		Stoddard v. Chambers, 2 How.	
		285,.....	124
		Stone v. Murphy, 2 Ia. 35,.....	504
		Stoudenmire v. Brown, 48 Ala.	
		699,.....	405
		Streeter v. Marshall S. M. Co.,	
		4 Colo. 535,.....	231
		Studevaut v. Jacques, 14 Allen,	
		523,.....	564

	Page		Page
Sublette v. Tinney, 9 Cal. 424, . .	145	U. S. v. Chapman, 5 Saw. 528, . .	124
Sullivan v. Oneida City, 61 Ill.		U. S. v. Howland, 4 Wheat. 103, .	428
242,	405	U. S. v. Knowles, 4 Saw. 517, . .	513
Sully v. Duranty, 3 Hurl. &		U. S. v. Turner, 7 Pet. 132,	361
Colt. 279,	499		
T.		V.	
Talmadge v. Wallis, 11 Wend.		Van Baalen v. People, 40 Mich.	
106,	261	258,	39
Taylor v. Potter, 4 Hill, 140, . . .	402	Vaughn v. Smith, 65 Ia. 579, . . .	419
Terhune v. Mayor, 88 N. Y. 251, .	306	Veeder v. Baker, 83 N. Y. 156, .	103
Territory of Montana v. Lee, 2		Vicars v. Wilcocks, 8 East. 1, . .	495
Mont. 124,	121	Vreeland v. Ellsworth, 71 Ia.	
Thompson v. State, 9 Oh. St.		847,	386
354,	361		
Thompson v. Yeck, 21 Ill. 73, . .	168	W.	
Thomson's Appeal, 22 Pa. St. 16, .	281	Wagelin v. Goe, 50 Ill. 459,	107
Thorpe v. Adams, Law Rep. 6		Walley v. Platte & Denver D.	
C. P. 125,	270	Co., 15 Colo. 379,	192
Thrift v. Fritz, 7 Brad. 55,	529	Ward v. Wilms, 16 Colo. 86,	286
Thuret v. Jenkins, 7 Martin, 318, .	180	Warden v. Newdigate, 52 Am.	
Tibbits v. Ah Tong, 4 Mont. 536, .	119	Dec. 567,	456
Timmings v. Timmings, 3 Hagg.		Warner v. Martin, 11 How. 209, . .	91
76 (5 Eng. Ec. 22),	11	Warren Hussey Application etc.,	
Tipton v. Teitner, 20 N. Y. 423, .	292	Sickles M. L. & D. 92,	119
Tipton v. Powell, 2 Caldwell,		Washoe Tool Co. v. Ins. Co., 56	
19,	283	N. Y. 613,	267
Towle v. State, 3 Fla. 202,	533	Watterman v. State, 67 Ill. 91, . .	345
Travelers Ins. Co. v. Denver, 11		Watts v. White, 13 Cal. 821,	105
Colo. 435,	336	Webber v. Petty, 2 Colo. Ct. Ap.	
Tripp v. Howe, 45 Vt. 523,	156	63,	270
Trustees v. Cherry, 8 Oh. St.		Weed v. Ballston Spa, 76 N. Y.	
565,	341	329,	541
Tucker v. Parks, 7 Colo. 62,	234	West v. Mayor of N. Y., 10 Paige,	
Tunnard v. Littell, 23 N. J. Eq.		539,	40
261,	281	Westbury v. City of Kansas, 64	
Tull v. State, 99 Ind. 238,	349	Mo. 493,	306
Turner v. City of San Francisco,		Weyer v. Beach, 14 Hun, 231, . . .	431
7 Cal. 463,	341	Wheeler v. Wade, 1 Colo. Ct. Ap.	
Turner v. McDonnell, 76 Cal.		66,	64, 270
177,	564	Whitaker v. West Boylston, 97	
Twyne's Case, 2 Coke's R. part 3,		Mass. 273,	541
80,	179	White v. Carpenter, 2 Paige Ch.	
T. & W. R. R. Co. v. Daniels,		217,	281
21 Ind. 257,	236	Wilder v. Railway Co., 70 Mich.	
U.		382,	407
Underwood v. Hitchcox, 1 Ves.		Wilcox v. Jackson, 7 Colo. 526, .	67
279,	143	Wiles v. Maddox, 26 Mo. 77,	6
Underwood v. McDuffee, 15		Willard v. Bosshard, 68 Wis.	
Mich. 361,	467	454,	421
Union B. Mfg. Co. v. Lindsay,		Wilson v. Chilcott, 12 Colo. 602, .	39
10 Brad. 583,	544	Wilson v. Voight, 9 Colo. 614, . .	108
U. P. R. R. Co. v. De Busk, 12		Woodward v. Earl of Lincoln, 3	
Colo. 296,	45, 160, 399	Swans, 626,	108
U. P. Ry. Co. v. Gibson, 15 Colo.		Woodward v. Hanchett, 52 Wis.	
299,	127	482,	103
		Wooley v. Newcombe, 87 N. Y.	
		605,	553

LIST OF CASES CITED.

xvii

	Page		Page
Worden v. Searles, 121 U. S. 14,	108	Young v. G. H. & M. Ry. Co.,	
Wray v. Carpenter, 16 Colo. 271,		56 Mich. 430,.....	317
244, 449. 458			
		Z.	
Y.		Zaleski v. Clark, 44 Conn. 223,	53
Yott v. The People, 91 Ill. 11,..	198	Zeigler v. Ala. R. R. Co., 58 Ala.	
		594,....	405

IN MEMORIAM.

HON. WILLIAM E. BECK.

At a session of the Court of Appeals, held on Wednesday, January 11, 1893, the following resolutions, adopted by the Denver Bar Association, were presented by the Hon. Chas. S. Thomas :

WHEREAS, death has removed from our midst the Honorable William E. Beck, long a distinguished member of the legal profession, a member of the convention which framed the Constitution of this state, for nine years one of the justices of the Supreme Court of this state, and for six years the chief justice of the court, and for three years the reporter of its opinions;

Therefore, Resolved, That in the loss of our departed brother we mourn an able lawyer and distinguished jurist, a faithful public servant and a worthy citizen, whose life affords an example deserving of commemoration and emulation.

Resolved, That we tender to the bereaved widow and friends our sincere sympathy and condolence in this affliction.

Resolved, That an engrossed copy of these resolutions be transmitted to the widow of our departed brother, and that a like copy be presented to the Supreme Court and Court of Appeals, with request that the same be spread upon the records of each of said courts.

In presenting the foregoing resolutions, Mr. Thomas said :

The angel of death has been our frequent visitor during the past twelve months. Within that time the bar of this court has followed the ashes of several of its most cherished members to their last resting places, and met to solemnize their memories by appropriate expressions of sorrow and regard, to be enrolled upon the records of those earthly tribunals of which they were once a part, but which will know them save in recollection nevermore. In the performance of the saddest but most sacred of duties, we have within that period been required to appear before the bench on many occasions to ask for a suspension of its routine duties that we might for a few short moments commemorate the virtues and invoke the example of our departed brethren.

Again the sad procession, with immortelles in hand, with bowed heads

and stricken hearts, approaches this honorable court and asks to lay their chaplets at its shrine. For another brother has passed over the range, and entered the realms of the great Unknown. Another of our band has laid aside his briefs and books, closed his desk for the last time and vanished in the shadows of the evening. The "Windowless house of death" is his; and ours, the memory of what he was and did.

William E. Beck of the Colorado bar, member of the Constitutional Convention, Judge of the District Court, Chief Justice of the Supreme Court, and reporter of its decisions, departed this life on the 2d day of September, A. D. 1892. A successful practitioner of Ottawa, Illinois, in early life, he came to Denver in 1871 in search of health. He engaged in business here until 1873, when he removed to Boulder, and at once took a high place in his profession. Universally beloved and admired, he was, upon the admission of the state, chosen to represent his county in the constitutional convention. In that body he was an active and conspicuous member. Painstaking, industrious and vigilant, his labors are illustrated by many of the provisions of our organic act, whose soundness and utility have stood the test of that most inexorable of all critics—Time. He competed for the chairmanship of the convention, and was defeated by the Hon. J. C. Wilson by a narrow margin of one or two votes.

In the fall of 1876 he was elected Judge of the First Judicial District of the young state which he had helped to organize, and so well and satisfactorily did he serve the interests of the people, that within three years he was with singular unanimity nominated for Judge of the Supreme Court to succeed Hon. H. C. Thatcher, whose term was soon to expire. For the next nine years his name was indissolubly interwoven with the judicial history of the state. For six years he was Chief Justice. Questions of constitutional and statutory construction, and those arising out of the comparatively new industries of arid land cultivation and mining, were perpetually presenting themselves during this time for determination. To their solution he applied himself unremittingly. He never faltered or sought to evade them. To the discharge of his duties he brought a ripe experience fortified by good training and natural qualifications which made him honored, respected and loved. His character was unimpeachable, his integrity spotless. He left the bench as he went upon it, with the confidence and regard not only of the bar but of all our people.

At the close of his term Judge Beck was appointed to the office of Supreme Court reporter. From that time until his death he was chiefly occupied with the labors of that position.

Always physically delicate, his system was unequal to the strain imposed upon it by the arduous duties of the bench. Long before his term expired his friends were apprehensive of his speedy dissolution. Subject to sudden attacks of alarming illness, those who knew him well feared the consequences of continual toil. Yet he lived on and worked

on, confident of ultimate restoration to perfect health, when a distressing accident reduced him to a constant condition of invalidism, ultimately in his sad demise.

I knew Judge Beck quite intimately for more than twenty years. I knew him socially, as a man of affairs, as a lawyer and as a jurist. Cold and reserved in his general demeanor, he was withal one of the most companionable of men. He did not make friends rapidly or easily. Of a studious disposition and leading a sedentary life, he was apparently unsocial and uncongenial, yet he never repelled the advances of others or sought to avoid the freest intercourse with his brethren. He was studiously regardful of the interests and feelings of others, and that enfeebled physical condition which so frequently provokes mental irritation seldom disturbed the normal operation of his mind.

Judge Beck was not an advocate. He was not a trial lawyer. When at the bar he found work in court somewhat distasteful. His substantial merits were all in another direction. The office and its duties were more congenial, and those he discharged with conspicuous ability. As an adviser and preparer of cases at *nisi prius* and on appeal he was more than a success.

The young lawyer struggling for a place on the ladder and the stranger at the bar always found a sympathizer in Judge Beck.

He once said that to discover and assist merit in the profession was one of the greatest pleasures in life, and to the extent of his power he sought to gratify that pleasure.

He loved his profession for itself and looked neither beyond nor above it. To him it was not a means but an end. His ambitions were bounded by its limitations, yet it extended to them. He did not accumulate a fortune in its pursuit nor seek to acquire one elsewhere. Devotion to duty was his watchword, and faithfulness to all things his guide. Quiet, unobtrusive and modest, he lived a noble and upright life, one which we may delight to remember, and emulate with certain advantage.

In the dark hours of the night, in the solitude of slumber, without immediate warning to the nearest relative or the dearest friend, he passed away as peacefully as a child lapsing into sleep. The light of the morning sun streaming through his window kissed his pallid lips, and those who soon after entered his chamber found him cold and still, but with the painless expression of everlasting peace upon his wasted features. Gently, sadly they bore him away, and we who survive him will be fortunate indeed if, when the last hour shall come for us, we shall be as well equipped for the final journey and shall be permitted to enter upon it with so little struggle, so little pain, so little tribulation.

REED, J., responded on behalf of the Court.

Imperious Death has been busy and is inexorable in the ranks of the profession. We are again called to pay the last sad tribute to a loved, respected and able associate.

In the death of the Hon. William E. Beck we fully realize the great loss sustained by the bar and the state. We feelingly and heartily indorse the sentiments and regret expressed in the resolutions of the Bar Association of the state, and the feeling and able memorial of Hon. Chas. S. Thomas as the representative of the Association. In many instances such proceedings are comparatively meaningless; in the presence of death the veil of charity is frequently drawn over predominating weaknesses of life, and very properly the virtues only are remembered. In this instance such is not the case. His was a pure, conscientious and laborious life. Calumny can point to no act to tarnish an honorable, spotless reputation.

I knew him intimately for over twenty years, at the bar, as Judge of the District Court, as a Justice and Chief Justice of the Supreme Court, and lastly, to the time of his death, as the careful and able reporter of the decisions of the Supreme Court and this Court. He went upon the bench at an early date; law was chaotic and illy defined; the precedents and principles of the common law were to be applied to physical conditions unknown and differing materially from those where the laws originated and had been applied—to a new civilization, new industries, under new local and climatic conditions. The judiciary and the bar were compelled to formulate and adapt the law to such new existing conditions; to this peculiar labor he contributed fully his share. His life was devoted to his profession; it engrossed him to the exclusion of everything else; no duty was too onerous; no labor too great; careful, conscientious, laborious and painstaking; never swayed by public clamor or influenced by personal considerations. His opinions show careful thought and great industry.

He was modest, unobtrusive, reserved, even with his most intimate friends. He lacked the social qualifications that court and gain popularity, but he was absorbed by the duties of his office, and the great and sole ambition of his life, success in his chosen profession, and trod his selected path with a dignity and singleness of purpose worthy of all emulation.

The bar and the people of this state owe him a debt of respectful gratitude that can now only be paid by years of kind, respectful remembrance.

REPORTS
OF THE DECISIONS
OF THE
COURT OF APPEALS
OF THE
STATE OF COLORADO.

JANUARY TERM, 1892.

THE COLORADO SPRINGS LIVE STOCK COMPANY, APPELLANT, v. GODDING, APPELLEE.

2	1
388	263

1. PRACTICE.

In the absence of a bill of exceptions containing the evidence, assignments of error based upon rulings admitting testimony or as to the effect thereof will not be considered, but the sufficiency of the complaint may be the subject of inquiry.

2. MEASURE OF DAMAGES.

A party having contracted to purchase hay at an agreed price refused to do so. Thereafter the hay was sold for the best price obtainable. Held, that the measure of damages for the breach of the contract was the difference between the contract price and that for which the hay was sold.

Appeal from the District Court of Weld County.

THE plaintiff, Talmai F. Godding, brought this action for damages sustained by reason of the defendant's refusal to purchase certain hay according to the terms of a written agreement between the defendant and one John E. Godding, which had been assigned to the plaintiff with the knowledge and consent of the defendant, and which contained a provi-

sion that it should bind the assigns of either party. The plaintiff recovered judgment and the defendant appealed.

Mr. JAMES W. MCCREEERY and Mr. WILLIAM HARRISON, for appellant.

Mr. B. L. CARR and Mr. F. P. SECOR, for appellee.

BISSELL, J., delivered the opinion of the court.

This judgment cannot be successfully assailed. The testimony was not preserved by a bill of exceptions, and without it there can be no determination of any matters suggested as error save that predicated on the insufficiency of the complaint. It is quite possible that this pleading is in some respects inartificial, and that an unusually careful pleader might have inserted some further allegations. They were not absolutely essential to the statement of a cause of action, and if the pleading was defective in this particular, it could only be reached by a technical demurrer put in before the issues were made up. The defendants answered and the cause was tried without a jury. In the condition of the present record it will be assumed that sufficient evidence was introduced on the hearing to justify the judgment which the court rendered, and that due proof was made of all facts essential to a recovery which were admissible under the pleadings.

It was an action brought against the Live Stock Company to recover the damages which the appellee claimed to have sustained from the breach of a contract by the company for the purchase of a lot of hay, which had been contracted for between the company and one John E. Godding.

It is true that the contract was in many respects executory, since it covered the crops that were to be cut on Godding's ranch for three successive years. It is wholly unnecessary to discuss the question of the assignability of the contract, though that might probably be maintained under the authority of *LaRue v. Groezinger*, 84 Cal. 281, since the complaint

states that the transfer was with the knowledge and consent of the company.

It would serve no useful purpose to analyze the complaint and state its contents for the purposes of demonstrating, according to the rule in *Herfort v. Cramer*, 7 Colo. 483, that the complaint presents no such substantial defects as that, taking the facts to be admitted, it can be said to present no cause of action. The contract itself is set out, and that in terms certainly obligated the company to take whatever alfalfa was cut by Godding on his ranch during any of the years specified in the agreement. The complaint substantially avers performance on the part of Godding or his assignee, the failure of the company to accept the property at the time and place where by the agreement it was to be delivered, and alleges the damages resulting from the company's nonperformance. It avers that the hay was sold, and the difference between the contract and the selling price is stated, and that loss is what the plaintiff seeks to recover. That the plaintiff could recover, and that this was the measure of his damages if the proof corresponded with the allegations there is no question. *Gordon v. Norris*, 49 N. H. 376 ; Schouler's Personal Property, vol. 2, p. 544.

It will be assumed that the proof was ample and the court justified in its conclusion. There are no other matters which need be considered to determine the rights of these parties on the record and the judgment will therefore be affirmed.

Affirmed.

FELT ET AL., APPELLANTS, v. CLEGHORN, APPELLEE.

1. SALE OF CHATTELS—STATUTE OF FRAUDS.

No sale of chattels can be maintained as against an execution creditor, unless there be an immediate delivery and change of possession of the articles sold, and such possession must be open, notorious and unequivocal.

2. EXECUTION—HOW LEVIED.

An officer seeking to satisfy a writ against a member of a firm out of copartnership property should take the firm goods into his custody, sell the debtor's undivided interest therein, and put the purchaser into the joint possession of the property sold.

3. LEVY—WHEN NEED NOT BE UPON ALL FIRM EFFECTS.

An officer is not required to seize all the copartnership property, under process, against one of the members of the firm, when a sale of the interest of that partner in a portion of it will satisfy the writ.

4. PRACTICE—DISCRETION.

The conduct of the trial and control of counsel is so fully within the discretion of the trial court, that its action in this respect will not be reviewed unless it is manifest that discretion has been plainly and grossly abused.

Appeal from the District Court of Rio Grande County.

Messrs. HOLBROOK & BROWN and Mr. C. M. CORLETT, for appellants.

Mr. E. F. RICHARDSON and Mr. Wm. E. BECK, for appellee.

BISSELL, J., delivered the opinion of the court.

For some time prior to the first of August, 1889, Ewing & Felt were engaged in the mercantile business in Monte Vista. At that time Corthell, one of the appellants, was operating a ranch near that place and had some stock running on the range. About the 7th of August negotiations were commenced between Ewing and Corthell for the sale and purchase of Ewing's interest in the firm, which was doing business under that firm name of Ewing & Felt. The deal

Col. App.	4
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was completed by the transfer of Corthell's stock to Ewing some time during that month. The time of the transfer is one of the most material elements in the controversy. The appellee Cleghorn was sheriff of Rio Grande county, and on the 17th of August levied his writ upon a portion of the stock of goods which had been owned by Ewing & Felt to secure the satisfaction of a judgment which had been obtained against Ewing by one of his individual creditors. The present action was one of replevin by Felt & Corthell, who composed the new firm. They insisted that the transaction between Ewing and Corthell was *bona fide*, for a valuable consideration, concluded before the levy of the writ. The *bona fides* of the sale, and the time of its completion, were the subjects of much testimony on either side. The appellants offered proof which tended to show that there had been a delivery of the goods and a payment of the consideration prior to the 9th of August. The appellee on the contrary introduced much evidence to show that there was no such change of possession as is essential under the law to transfer title as against an execution creditor, and also that in fact the sale itself was not completed until several days after the levy of the writ. On this issue, and as to all of its collateral facts, the jury found for the officer and sustained his levy. It is clearly settled in this state that no sale of chattels can be maintained against the levy of an execution creditor unless there be a delivery of the goods and an immediate change of possession. The necessary character of the transfer is clearly settled by our own adjudications. The possession must be open, notorious and unequivocal, and it must be clearly evident from the circumstances put in proof that the title has passed from the seller to the purchaser. *Cook v. Mann*, 6 Colo. 21.

The finding of the jury was against the appellants on this question, and their conclusion is not without sufficient basis in the testimony to be binding on this court. If this well settled rule did not control the court, it would be disinclined to reverse the case on the contention that the verdict was not

supported by the evidence, for it is not presented by the abstract in that complete and satisfactory manner which is indispensable to enable a court to pass upon the weight and the sufficiency of the testimony.

In reality there is but one question of much difficulty in the case, and this springs from the action of the officer in taking possession of a portion of the stock of goods to satisfy the individual debt of the copartner Ewing. The contention is, that he was bound to take all of the goods into his custody, sell the interest of the copartner to satisfy the claim against him, and return the goods to the joint possession of the other partner and the purchaser at the sale. There is some doubt whether even this question is properly saved and presented by the record, but the doubt has been resolved in favor of the appellant and the court will decide it. For many years it was a grave question with the courts as to what course ought to be taken by an officer when he held a writ against one member of a firm, and he sought to satisfy the claim out of the copartnership property. It may be taken to be tolerably well settled by the current of authority, that his duty is to take the firm goods into his possession in such manner as that they may be said to be in his custody, sell the copartner's undivided interest therein, and put the transferee into the joint possession of the property sold. Freeman on Executions, vol. 1, sec. 125; *Hershfield v. Claflin*, 25 Kas. 166; *Phillips et al. v. Cook*, 24 Wend. 389; *Wiles v. Maddox*, 26 Mo. 77; *Chandler v. Lincoln*, 52 Ill. 75.

Whether it be the duty of the sheriff to seize all the copartnership property when the sale of the interest of the partner in a quantity less than the whole will satisfy the writ, has not been so universally adjudged, although the right is recognized in the Missouri case above quoted. On principle there should be no difficulty in the premises. The officer is always responsible for the proper discharge of his duty, and will be liable in the event the execution creditor lose any part of his debt by an inadequate levy. This, together with the well known disposition of officers to pro-

tect themselves in such matters, is a sufficient guaranty for the creditor's rights. There is no reason to hold it necessary for an officer to take all the property of a firm to satisfy a small claim against an individual member, whose copartnership interest in the property is largely in excess of any possible rights of the creditor, which can be easily secured by the sale of a small portion of that interest. In this case the officer took less than the whole, but enough apparently so that the sale of the copartner's share therein would satisfy the debt. This he had a right to do, and the court correctly charged the jury in the premises.

This value the jury found to be \$1,000, and the appellants are not in a position to complain of the finding. They allege this to be the value of the goods taken, and there was proof enough in the case, in the absence of countervailing testimony, to warrant their conclusion.

A large number of the instructions given by the court are assailed in the briefs of counsel and assigned for error in the abstract. The court could well have avoided the labor of examining these instructions, since the abstract contains neither the instructions complained of, nor those given and those refused by the court, and it would be impossible from an inspection of that book to determine whether the court erred in what it gave, or in what it refused to give, or whether the whole case was fairly presented to the jury.

Contrary to the usual practice in a condition of things like this, the charge of the court was looked into, and as a whole it can be said to have accurately and impartially stated the issues and presented the law governing the case. The instructions which were refused were either embraced within what the court gave, or they were not justified by the evidence as the case made it.

It would not be useful to extend this opinion to the extreme limit necessary to the demonstration of the accuracy of this position. It is enough to say that there is nothing in respect of these matters which would justify a reversal of the case. The error predicated upon the action of the

court with reference to the limit put on the rights of counsel during the trial of the cause scarcely requires consideration. The appellants seem not to have been harmed by the procedure, and whether or not the rights of counsel were conceded to their fullest extent and acknowledged limit, it is not a matter which can be relied on to reverse the case.

The conduct of the trial, and the control of counsel within the bounds of their recognized privileges, is so fully within the discretion of the trial court, that its action in this respect will never be reviewed unless it is manifest that that discretion has been plainly and grossly abused. There is no such showing in this case, and there is no necessity to further consider this matter.

There are no substantial errors apparent in this record. The judgment must be affirmed.

Affirmed.

REDINGTON, APPELLANT V. REDINGTON, APPELLEE.

1. DIVORCE—ADULTERY A BAR.

The plaintiff's action for divorce was upon the grounds of desertion and non-support. Defendant joined issue and also filed a cross-complaint upon the ground of the plaintiff's adultery. The proofs showed the defendant to be guilty of desertion and non-support, and the plaintiff to be guilty of adultery; *held*, that both complaint and cross-complaint should have been dismissed.

2. PRACTICE IN DIVORCE CASES.

It is of no consequence how the court obtains the requisite legal knowledge of the fact of plaintiff's adultery. It may crop out of the proofs without having been pleaded, but must be acted upon by the court. If it shall appear, no divorce can be decreed.

3. GROUNDS OF DIVORCE—EQUALITY OF.

In estimation of law, all grounds of divorce are of equal force and validity, notwithstanding supposed differences, in point of morals, in the gravity of the offenses involved.

Appeal from the District Court of Arapahoe County.

2	8
25c	38
2	8
33s	452
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f34s	302

THE facts are sufficiently stated in the opinion of the court.

Messrs. T. J. O'DONNELL & W. S. DECKER, for appellant.

Messrs. BAXTER & WRIGLEY, for appellee.

BISSELL, J., delivered the opinion of the court.

The legal rights and obligations of these parties are fixed by the facts which are contained in the record, and those which in this court must be taken to be established by the verdict of the jury. They were married in 1874 at Danville, Illinois. They afterwards removed to Kansas which was their home until sometime in 1881, when, as the jury has declared by their verdict, Redington deserted his wife. Mrs. Redington brought this action of divorce against her husband, setting up three grounds; desertion, non-support, and adultery. Redington took issue on these allegations and filed a cross-bill asserting the adultery of his wife. The verdict expressly found the issues of desertion and non-support in the wife's favor, but made no affirmative finding as to the matter of the adultery. As the law seems to be, this is wholly unimportant, so long as the fact exists. There was an express finding that Redington deserted his wife in 1881. The circumstances of this desertion need neither be stated nor considered. The finding will not be reviewed. It is based on proof fairly submitted to the consideration of the jury. It is so well supported by the evidence that this court, if called on to pass on the facts, would find the same way. The husband then may, for the purpose of applying the rules of law which are decisive of the rights of the parties, be held to have done what the statute says shall give rise to a cause of action for divorce. The decree must then follow the bill and proof unless there be in the record that which bars the wife's recovery. The issue as to the wife's adultery tendered by Redington and accepted by her was not disposed of by any finding on the subject. Considering the course which

the trial court should have taken on the coming in of the verdict, this was not necessary to the entry of a correct and legal judgment in the premises. The fact averred in the cross-bill and upon which it rested, stands admitted by the wife in the testimony which she gave on the trial. This offense against the marriage law was committed long after the desertion and subsequent to the time when the right of action on the ground of desertion had ripened and matured. The decision however does not turn on the question of time nor upon any conclusion as to the order of events which gave to the respective parties their right to sue under the statute. Clearly then according to the record both parties have been guilty of what, if either were innocent, would give to the one injured a maintainable cause of action. The inquiry is thus reduced to the narrow but much controverted one whether any statutory ground of divorce can be the subject of a good recriminatory plea when the suit or cross-bill is based on the adultery of the one recriminating the other offense. In the hopeless conflict among the authorities both English and American, and without the guiding and controlling force of an adjudication in our own state, we must follow what seems to be the current of the main stream of judicial determination influenced, perhaps, by our own judgment of what the law should be in such cases. Since it is the conclusion of this court that the cases of *Ristine v. Ristine*, 4 Rawle, 460, and *Buerfenning v. Buerfenning*, 23 Minn. 563, are not in harmony with the general doctrine of the American courts, it may be well to advert to the difference between the statutes of these states and that of Colorado upon this subject. Both these decisions are wholly rested on the supposed necessity to observe well established rules of statutory construction. The Pennsylvania court seems to have been justified in the construction which they put on their act. That act definitely provided that if the defendant should "allege and prove" certain things they should in such actions be "a good defense and a perpetual bar." Very properly that court held that such certain and express provisions must, by

well settled canons of construction, be taken to exclude any other defenses which might be supposed to exist because a right of action upon some other statutory ground had come to the plaintiff in the suit or the cross-bill. A similar statute led the Minnesota court to follow the *Ristine* case. It would serve no good purpose to analyze the *Buerfenning* case and demonstrate, were it possible, that in so far as it varied from the authority which it followed it was not well sustained. It is enough for this court to hold that it is unhampered by any such authoritative legislative expression of purpose. Under the 4th section of our divorce act it is wholly unimportant whether the collusion or adultery be alleged by the defendant or by either party. These matters are not made the proper subject of a plea either in express terms or by implication. It is of no consequence how the court obtains the requisite legal information. "If it shall appear" * * * "no divorce shall be decreed." It is more in the nature of a limitation upon the power of the court whenever the record shall disclose the existence of either fact. There is no *onus probandi* cast on the recriminating party. It may crop out in the plaintiff's proofs and there would then be neither necessity nor occasion for plea or the offer of evidence in support of one. If the court learn by evidence which is properly before it that collusion exists or adultery has been committed by both parties, it can render no decree of divorce. As it is well put by Sir William Scott in *Timmings v. Timmings*, 3 Hagg. 76 (5 Eng. Ec. 22), "in cases of this nature it is incumbent on the husband to make such strict proof of the fact charged as shall not involve himself or create a legal bar; for if, by evidence which he brings to establish adultery, he at the same time involves and implicates himself, the wife has the full benefit of this evidence." The court would only be bound to accept these adjudications as authority on the principle that an affirmative statute which enacts that certain offenses shall constitute a good defense and a bar, must be taken to exclude the consideration of any other. We are unembarrassed by this

principle of construction and we are not forced to question the accuracy of these cases. Bishop on Marriage and Divorce, 5th edition, vol. 2, section 95. Bishop on Statutory Crimes, sections 153 and 154.

These preliminary statements of fact, and this conclusion concerning the statute, simplifies and narrows the investigation to the single question already stated.

Since the courts of this country first commenced to discuss this question they were hampered by what seemed to be an unavoidable necessity to rest their decisions upon the only precedents then available from the English tribunals. It occasioned this difficulty. The English courts until the recent Divorce Act only granted divorces *a mensa et thoro*, and did not accord to any other offense than that of adultery equal force for the purposes either of a bill or of a plea. The earlier American adjudications followed this line of reasoning, adopted those cases as authority for their decisions, and there are in the American Reports cases which adjudicate that neither cruelty, nor desertion, nor any other statutory ground, can be made the subject of a valid and successful recriminatory plea. They rest on no correct doctrine, and unless the conclusion be forced by some affirmative statute it should not be accepted. It is a rule recognized in all courts, and applicable to all classes of actions, that every suitor who seeks redress at the hands of a court should come unfettered and unsullied by faults and wrongs of his own commission against the contending party. This principle has become aphorized in the law as "clean hands." It is plainly and palpably violated and infringed whenever a litigant who prays a divorce has been guilty of any act which under the statute would furnish the defendant a cause of action as against him. This alone ought to be sufficient to defeat the plaintiff's right of recovery, for she was guilty of a great offense against the marital obligation before she filed her bill. It has never been sufficient even under the English authorities to respond that even though this be true, you first sinned and I may therefore recover. The law left them where it found them. This conclusion finds strong support

in the consideration that under the statute every offense which is thereby made a ground for divorce is of equal force and validity, and when presented and proved entitles the litigant to identically the same relief. It is therefore impossible for the courts in determining the obligations of the marriage contract to hold that there is any difference in the legal character of the breaches when their action is invoked upon any one of them. Whatever may be the ethical considerations, and the gravity of the offenses laid in a moral point of view, they are of no value in this respect. *Conant v. Conant*, 10 Cal. 250; *Hauff v. Hauff*, 48 Mich. 281; *Nagel v. Nagel*, 12 Mo. 53; *Johns v. Johns*, 29 Ga. 718; *Shackett v. Shackett*, 49 Vt. 195; *Ribet v. Ribet*, 39 Ala. 348; *Adams v. Adams*, 17 N. J. Eq. 324; *Handy v. Handy*, 124 Mass. 394.

Under the law as established by these authorities, on the coming in of the verdict establishing the desertion by the husband, the court being advised by the wife's admission that she had been guilty of adultery, should have dismissed both bill and cross-bill and left the parties bound by the tie which they had severally dishonored. Under these circumstances and with the pleadings and the suit in its present shape the court should make no decree concerning alimony. It is doubtless true that since the husband must remain obligated by his marriage contract he is bound to care for his children and to maintain and educate them. It is wholly unnecessary to determine what his duties may be with reference to his wife, since there is nothing in the proofs offered in the case which would enable the court to judge of the gravity of her temptation, nor how far the husband was responsible for her fault by reason of his conduct. This matter is designedly left wholly undetermined, since the issues and the proofs do not properly present the question.

Because of the error committed by the court in entering a judgment on the verdict in favor of the wife, the cause must be reversed and remanded with directions to the court below to dismiss both the bill and the cross-bill, with such order as to costs as to that court may seem proper.

Reversed.

2	14
4	226
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**THE VICTORIA GOLD MINING COMPANY, APPELLANT, v.
FRASER, ET AL., APPELLEES.**

1. CONTRACT THROUGH AGENT.

Persons dealing with a corporation through an agent must, at their peril, advise themselves as to the scope of the agency and powers of the agent.

2. AGENT—WHAT POWERS NOT PRESUMED.

The general manager of a mining and milling company has no power, by virtue of his office, to bind the company by contracts for the purchase of machinery.

3. RATIFICATION.

The principal may, by ratification of the unauthorized act made in its behalf, make it its own and become liable thereon.

4. NEW TRIAL—FAILURE OF PROOF—GROUND FOR.

While appellate courts will not disturb a judgment upon a mere question of weight or preponderance of testimony, yet when there is an absence of proof on some point which is fundamental to the recovery, neither verdict nor judgment is conclusive upon the appellate tribunal, and a new trial will be ordered.

Appeal from the District Court of Arapahoe County.

Mr. W. N. MCBIRD, and Mr. M. B. CARPENTER, for appellant.

Mr. R. D. THOMPSON, for appellees.

BISSELL, J., delivered the opinion of the court.

It is impossible to uphold this judgment. It is unsupported by the evidence though it was entered upon the verdict of a jury. The law by which the rights and correlative obligations of the parties are to be measured was neither accurately nor adequately expressed by the instructions.

Some time in the latter part of the year 1889, Fraser and Chalmers, the appellees, were a copartnership doing business in the city of Denver. On that date they sold a Huntington mill for \$765 on the order of one A. J. Ware. It is

their contention that the mill was sold to the appellant, The Victoria Gold Mining Company. The company disputes the assertion and contends that if the mill was sold at all it was sold under such circumstances that the law would make the transaction a sale to Ware, who would be responsible for the purchase price. Manifestly under this issue the principal inquiry was as to the agency of the individual making the purchase. Nothing is more clearly settled than that a person who deals with the agent of a corporate body must advise himself as to the extent and scope of the powers of the agent, unless by reason of his antecedent dealings with the company, or the nature of the business done, and the character of the agency itself, there is such an authority by implication that he has under the law the right to rely upon these appearances, and actual proof of power is thereby dispensed with. Appellate tribunals will never disturb a judgment entered upon the verdict of a jury on a mere question of weight or preponderance of testimony; but wherever as in this case there is an absolute want of proof on some fundamental point which the plaintiff must establish to entitle him to recover, neither a verdict nor a judgment is ever held conclusive on the appellate tribunal. The only testimony tending to establish the fact that the mill was bought for the company, or that Ware who purchased it was the agent of the corporation with such authority to buy as would necessarily bind it, was that made by the proof that Ware was the general manager of the Milling Company. It was a corporation carrying on the milling business in Breckenridge with a large plant of several mills. The defendant proved that under its charter and by-laws Ware was without authority to make any contracts on behalf of the corporation unless he was thereunto previously authorized by the board of directors. It was established that no such authority had ever been conferred on Ware, and that he had never been authorized by the board to buy any mill. Under this showing there was no proof of any agency which would bind the company in the transaction, unless it can be said that authori-

ty to buy a mill is necessarily to be inferred from the appointment of a person to act as the manager of a mill company. There are two reasons why this implication should not arise; first, there was no proof that managers of milling companies usually possess powers from which the inference might be drawn as a matter of law; and second, it is within the experience of every person familiar with mining operations that the manager of a mill company has no such power unless it be directly conferred. To hold otherwise would be to say that such a manager, whose manifest duty it is to run the mill which is furnished him, may of his own accord extend the operations and plant of the company beyond the limits of either their plans, their purposes or their capital. It cannot be said as a matter of law that any such powers are to be implied from the title and the duties incident to the appointment. Under these circumstances it was the duty of the plaintiff to show that the manager as such had the specific and broad power necessary to bind the company by the purchase. It is quite true that under the well established doctrine of ratification the company might be made liable by the receipt of a mill thus purchased, if they appropriated it to their own use or did any other thing to which the law would affix the responsibility arising from the adoption of the unauthorized act. There was no proof of that description offered. It may be conceded that there was some showing that the mill was shipped to the company at Breckenridge by Ware's order, but this was not followed by any proof that the company ever received it, or that they ever appropriated it. In fact the proof was that the mill went on to property in which the company had no interest. Even though it be conceded that Ware received it after its shipment in the name of the corporation, this alone would not amount to such a ratification as is essential to the establishment of the corporate liability.

The jury were not correctly instructed. They were told substantially that Ware was the manager of the company, and that if as such manager he ordered the mill shipped to

it, and it was thus shipped and delivered, the plaintiff might recover. This is not the law, nor, it if were, is it applicable under the proofs, for there was no evidence of any delivery to the company which would make them liable for the goods, and it omitted the essential element of acceptance. The defendant requested instructions relative to the law of agency. They asked that the jury be told when a person dealt with a corporation through one of its members he did it at his peril, and it was his duty to see to it that the person with whom he transacted his business was actually such agent, and that what he did was within the scope of his authority. That this is the law, and that they were entitled to have the jury instructed upon this subject is undoubtedly true. The court neither gave the instructions which were asked, nor any which were the equivalent of them.

The instruction given on the legal force and effect of the by-laws of the company is probably not available as error on this hearing, since no assignment is based on it. It is not deemed necessary to express all the rules which must govern the settlement of this controversy, for they will probably be correctly laid down on the next trial.

Since the judgment is wholly unsupported by the necessary proof of a most material averment, and the court erred in instructing the jury as to the law, this case must be reversed and remanded.

Reversed.

ROBINSON ET UX., PLAINTIFFS IN ERROR, v. THE DOLORES NUMBER TWO LAND & CANAL CO. ET AL., DEFENDANTS IN ERROR.

1. PLEADING—FACTS, NOT CONCLUSIONS, SHOULD BE STATED.

The conclusions of the pleader stated as facts, broad, general assertions, sweeping and comprehensive accusations of conspiracy, fraud, mismanagement and incompetency, cannot be made to supply the want of a specific statement of facts.

VOL. II—2

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2	17
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2. SAME—ALLEGATIONS.

The allegations in a pleading must be positive and not by way of recital, and must be of facts only and not of law.

3. SAME—FRAUD.

Fraud is a conclusion of law from the facts stated. It is not sufficient in a pleading to make a charge of fraud in general terms. The particular fraudulent acts should be pointed out and stated.

4. CORPORATE LOANS—MISAPPLICATION.

A misapplication and waste of money received by a corporation is not a ground for invalidating the security upon which the loan was obtained.

Error to the District Court of La Plata County.

THIS action was commenced by Benjamin W. Robinson and wife against The Dolores Number Two Land and Canal Company and others, for the cancellation of certain deeds, injunction, appointment of a receiver, accounting, etc. Upon demurrer to the complaint, the action was dismissed. The plaintiffs bring error. The nature of the complaint is fully set forth in the opinion of the court.

Messrs. THOMAS and THOMAS, and Messrs. HIPP and TESCH, for plaintiffs in error.

Mr. W. M. MAGUIRE, Mr. S. W. CARPENTER and Mr. H. C. CHARPIOT, for defendants in error.

REED, J., delivered the opinion of the court.

This was a suit in equity brought by plaintiffs in error against The Dolores Number Two Land & Canal Company, The Dolores Community Ditch Company, Joseph W. Helmer, trustee, Emerson B. Tuttle, trustee, and John V. Farwell (beneficiary), asking for the appointment of a receiver, an injunction, an accounting, etc., etc.

It is alleged that The Dolores Number Two Land & Canal Company was organized and incorporated in January, 1887, for the purpose of constructing a canal or ditch to divert the water from the Dolores river to irrigate Montezuma valley, a valley about fifty miles in length and fifteen miles in width.

That before entering upon the construction of the canal the company had accurate surveys, and estimates of the cost of construction, and it is alleged that the estimated cost of sixty thousand dollars was ample to construct the main line of the canal. That the capital stock of the company was \$200,000, divided into 2000 shares of \$100 each. That the plaintiff, Benjamin W. Robinson and his wife, Mary H., were from and after the organization of the company *bona fide* owners for value of 245 shares of the capital stock. At what price per share is not stated, nor is it stated in what manner payment was made, nor is it stated who became the owners of the remaining 1755, what prices were paid or how payments were made, nor whether anything was realized from the sale of the capital stock, nor what, if any, use was made or to be made of the proceeds. The fair inference from the pleading is that the capital stock was divided among the promoters and incorporators gratuitously; for the next allegation is, that plaintiff, B. W., spent large sums of money (no amount stated), in organizing the company, and that as the authorized and accredited agent of the corporation he went to Chicago to secure a loan of \$100,000, a sum \$40,000 in excess of the amount alleged to be needed to construct the canal. That by his skill and enterprise he succeeded in securing a loan of \$100,000 from J. V. Farwell upon the bonds of the company. It is hard to reconcile the next allegation,—where it is said that after plaintiff *had secured the loan*, Farwell sent his agent, Helmer, to the state to ascertain the value of the franchise and property of the corporation, and having ascertained it to be worth a half million dollars Farwell, Helmer, and one H. N. Tuttle entered into a conspiracy to obtain possession of the entire property “and demanded as a condition precedent” to making the loan of \$100,000 alleged to have been already secured by plaintiff—that 45 per cent of the entire capital stock be assigned and delivered to Tuttle, and further demanded that Farwell should name two members of the board of directors of the corporation. That these requirements were complied with by the company.

That the company issued its bonds for \$100,000 on the first day of July, 1887, and on the same date executed to Helmer, as trustee, a deed of trust upon its property, rights and franchises to secure the payment of the bonds. That such deed of trust contained a provision that if default be made in the payment of interest, the whole amount, principal and interest, should become due, etc. That some time prior to July 1st, 1887, and before the \$100,000 in money was paid by Farwell, "the board of directors was reorganized in the interest of Farwell, and from that time on Farwell had full control of the board of directors and complete management of the affairs of the company." How the board was organized in his favor, and how he obtained full control are not stated.

It is also alleged that 45 per cent of the capital stock of the company was transferred to Tuttle for Farwell's benefit, upon the books of the company. Then follows a vague, indefinite allegation—"that immediately thereafter the said conspirators set about to ruin and wreck such company in pursuance to their original plan" for the purpose of acquiring the property by wasting and squandering its money and leaving it insolvent. That good engineering ability was requisite in constructing the works, but none but incompetent, impracticable and visionary managers were employed, etc. That by reason of the employment of incompetent persons and of the doing of the work in an improper manner, the work was not completed, the \$100,000 wasted and squandered and the company insolvent.

Then follows five closely printed pages of the abstract, alleging, in effect, that the Montezuma valley was uninhabited or nearly so; that in order to make the undertaking a success and dispose of water when carried, it was necessary to have agriculturists, users and consumers of water settle in the valley, those who would buy water rights and use water. That on the 15th day of April, 1887, plaintiff, by a resolution of the board of directors unanimously passed, was appointed a "commissioner of colonization," to attend to the

peopling of the valley and superintend the construction of lateral ditches for the distribution of water, etc. That plaintiff was well qualified for the duties of the position and business of securing colonies and emigrants, and that he immediately entered upon the duties of his office. That in the ensuing month, just "as he got fully started and his plans and purposes fully matured, * * * the board of directors of the company * * * wrongfully and fraudulently * * * compelled him to abandon the business and efforts to populate the said Montezuma valley," and the company never employed any one else to take his place and populate the valley. That by such wrongful and fraudulent acts, and by its failure to complete the canal and furnish water, the valley, instead of being populated, densely, as he intended, was depopulated, "*and by this course of suicidal proceedings hundreds of families, which had been attracted to this valley by the said Robinson, and by reason of books by him composed, printed and circulated, were reluctantly forced to go elsewhere.*"

The facts contained in these last allegations hardly afford a basis for equitable relief, nor is any directly asked upon them. He does not ask to be reinstated in the position he was so well qualified to fill, alleges and asks no damage, nor states that he sustained any loss, even of books and printed matter, consequently, we conclude that it was incorporated into the complaint as a part of the *evidence* to establish the allegations of incompetent management and want of administrative ability in the officers managing the company. If the allegations are true—and they must be so regarded on demurrer—no more conclusive proof could be needed to establish incompetency or a premeditated plan to "ruin and wreck" the company, than that afforded by the fact of discharging the plaintiff and desolating the valley. Had the company completed its canal, as it is alleged it should have done, so as to furnish water in the year 1888, and retained the plaintiff to populate the valley, the undertaking must have been an eminent success. The water and the people were both needed—the water without the people was useless—

and could not, as required by the constitution, have been regarded as applied to a beneficial use. A certain amount of water, or fluid of some kind, is supposed to be necessary to support animal life. Ghosts and disembodied spirits are supposed capable of existence without it, and yet in its absence, they are not cheerful. Dives was anxious to obtain the smallest quantity for "domestic purposes." Given plenty of water—a dense, thrifty population accustomed to its use, for drinking, lavatory and irrigating purposes, was indispensable. It is evident that plaintiff had correct views; both factors, united, were needed. His removal just at the time he had fully prepared himself to enter upon the proper discharge of the duties of his office, was an indignity and an outrage, but may have been inspired by the purest dictates of humanity. The water supply was needed at a date as early or earlier than the great influx of population. The company finding that, by the exercise of his ability, energy and zeal, the population was to precede the water, were compelled to remove him, or subject a large number of people to all the horrors of a severe and long protracted drouth.

Taking this view of it, the act may have been praiseworthy and not as supposed, "wrongful and fraudulent." The company was the modern "Moses," that was to smite the rock and render existence in the desert possible.

In the next allegation the charge is reiterated, "that the business affairs of the company have been mismanaged and conducted in a most reckless and extravagant manner, and that none but the most incompetent, untrustworthy and unskilled managers have been employed." That the company had spent and squandered nearly double the amount estimated as the cost of construction, had squandered and thrown away, by bad management, the \$100,000 obtained—was in debt \$45,000, and the work of construction not completed. Again, upon the next page it is reasserted, that Farwell, Helmer and Tuttle, by willful design and incompetency, had squandered the funds of the company; that the company was in debt \$45,000 and bankrupt, and applied to Farwell

for an additional loan of \$90,000, which was refused, unless the stockholders, without consideration, would relinquish and assign 20 per cent more of the capital stock of the company for the benefit of Farwell; that the individual stockholders, except Robinson and wife, who refused, acceded to the request and contributed the stock, and thereupon the \$90,000 was loaned by Farwell. The company issued additional bonds for \$90,000 and a second deed of trust was executed to secure the bonds, in which Emerson B. Tuttle was made trustee. That Farwell unlawfully extorted from the individual stockholders the 65 per cent of stock so as to obtain absolute control of the company for the purpose of wrecking it, but that plaintiffs absolutely refused to contribute to the last 20 per cent. We are nowhere informed from what source the first 45 per cent of stock was obtained, whether it was stock undisposed of and remaining in the company, or whether it was made up of individual contributions.

It is then alleged that the \$190,000 was largely wasted, thrown away and "expended for purposes other than company purposes," (but to what extent, and for what purposes is not stated), and that both deeds of trust made to secure the two loans aggregating \$190,000 are void. The next allegation is a reiteration of the former general charges of a conspiracy to wreck and ruin the company, wasteful and incompetent management, etc., to which is added an allegation that, with proper management the cost of construction should not have exceeded \$80,000. That construction could have been completed so as to have furnished water for the year 1888, and that if plaintiff, Robinson, had not been interfered with he would so have peopled the valley that an income of \$30,000 might have been realized from the sale of water for the year 1888. The following allegation is more important: "that said Farwell now owns over 80 per cent of the stock of said company, the greater part of which he acquired wrongfully and without any consideration and in derogation of the rights of these complainants." How obtained wrongfully and without consideration is not stated.

In regard to the first 45 per cent it is alleged that it was required as a bonus or gratuity, as a condition precedent to the loaning of the \$100,000 that the demand was complied with. If such was a fact he legally obtained the stock, and its transfer was the result of a mutual agreement; the demand could be declined or complied with at the option of the other party. The same may be said of the 20 per cent demanded as a condition for the loan of the \$90,000. It appears that plaintiffs did not contribute stock to satisfy either demand; that they were at the beginning and still are the holders of 245 shares. It seems that those who parted with stock as contributors regarded the securing of the money as a proper consideration. They are not complaining. How the securing of the stock from other individual holders was in derogation of the rights of plaintiffs is not stated, and we are at a loss to discover. If others saw fit to part with their stock, to Farwell, without consideration, such fact cannot be a ground for equitable relief of plaintiffs. How Farwell became the owner of the other 15 per cent to make the 80 per cent is not shown, but it is presumed he acquired it legitimately, otherwise, we would be informed. If, as alleged, Farwell holds over 80 per cent of the entire stock and plaintiffs' 245 shares, there is at most but about 150 shares outstanding in others. It is next alleged that on or about the (blank) day of (blank) year The Dolores Number Two Land and Canal Company made an attempted conveyance of all its water rights, privileges, franchises and property in the same, and the right to sell all the water rights and water and the right to receive all the future revenue to be derived from the sale of water belonging to it, to the Dolores Community Ditch Company, at the instigation of the conspirators, etc. "That said attempted conveyance is a fraud and void in law and equity, and a fraud upon these complainants and all innocent stockholders." These allegations are so vague, mysterious, indefinite and indeterminate that it is impossible to seriously consider them. If, as stated, it was only an attempt to convey, it, of course, was not consummated, no one

was injured. If it was "void in law and equity," "void things" are no things and require no notice. Whether it was a reorganization under a new name of the same corporation or a new and distinct corporation, whether the capital stock of the first corporation was increased, whether the scope and object of the new corporation were extended and enlarged, whether any consideration, nominal or otherwise, passed or was to pass, whether the possession passed from the old company to the new, whether the new company was capitalized and issued stock, we are not informed. The only information we have is "The organization of the said second company * * * by the same parties and for the same purposes, has so confused and complicated the legal constitution and *status* of both said companies, that it is almost utterly impossible for said companies or either of them to carry on the business," etc. This, certainly, would be the result, where two corporations created for the same purpose, and controlling the same property and rights, attempted, at the same time, to exercise such control. It is a condition without precedent, and without some facts stated,—some data,—it is impossible to say whether it is fair or fraudulent, legal or illegal. It certainly appears opposed to natural law—two bodies occupying the same space at the same time.

But it appears in the next allegation that the original corporation still retained sufficient vitality to exercise the important prerogative of levying assessments upon its stock, and that in the exercise of it, plaintiffs had been assessed to pay \$1,347.50. That there was no necessity for such assessment; that it was made by the conspirators to force a sale of plaintiffs' stock and buy it in, and that plaintiffs refused to pay such assessment. This is again followed by the general charges of mismanagement, incompetency, want of skill in employees, fraud and dishonesty, and upon "information and belief," collusion and conspiracy to wreck and ruin both companies. Then that plaintiffs, prior to commencing suit appeared before the board of directors and protested and complained and begged it to reform and correct their grievous

wrongs; that the requests were unheeded—the eloquence wasted.

The first part of the prayer is in the disjunctive or alternative, asking that a receiver be appointed to complete the construction of the work and disburse the money, or that an injunction issue to restrain the company from prosecuting the work and disbursing the money, and from proceeding to enforce the collection of the assessments against the plaintiffs; that the two trust deeds be decreed to be void and canceled, and for a full accounting of all moneys disbursed. This lengthy review of the complaint may seem unnecessary, but it is as brief a digest or synopsis of thirty-one closely printed pages as can be made for a proper understanding of the case. A demurrer was interposed specifying eighteen supposed fatal defects in the pleading, which may be consolidated and summarized in one, viz., that the complaint was bad for want of substance; did not state facts sufficient to entitle plaintiffs to the relief asked. The demurrer was sustained. The judgment is brought here for review.

In this case the well established rules and principles that control pleadings in equity, have been overlooked or disregarded. The conclusions of the pleader, stated as facts, broad generalizations, sweeping and comprehensive assertions of conspiracy, fraud, mismanagement and incompetency cannot be made, in pleading, to supply the want of specific facts.

“The allegations must be positive, and not by way of recital; and must be of facts only, and not of law.” Mitford & Tyler’s Eq. Plead. 64.

“The rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly, yet succinctly alleged. Whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision.” Ibid. 136; Story’s Eq. Plead. §§ 27, 28, 246–257.

Fraud is a conclusion of law, from the fact stated. It is

not sufficient in the bill to make a charge of fraud in general terms. It should point out and state particular acts of fraud. Story's Eq. Plead. §§ 251, 251a.

The capital stock of a corporation is usually the original and only source from which the money is obtained for the prosecution of the enterprise. By sec. 340, chap. 19 of the statutes it is declared: "No corporation shall issue stock or bonds, except for labor done, services performed, or money or property actually received." A careful examination of the authorities establishes the legal fact that the stock of a corporation is the basis from which is derived the capital; that the stock is regarded as money or its equivalent. It is alleged that the capital stock of the company was \$200,000; that it passed to the stockholders. Had it been disposed of at 50 per cent of its par value, the fund obtained would, according to the allegations of the complaint, have been ample to have completed the enterprise. From the complaint it appears that not a dollar of proceeds of stock ever went into the treasury, and that all the money received and used came from the Farwell loans. From the allegations, it is presumable that the stock was issued and used for gratuitous distribution among the promoters. The allegation is that plaintiffs were the "*bona fide* owners and holders of said capital stock," but it is not alleged that any value whatever was paid for it. If, as stated, Farwell furnished all the money for 65 per cent of the stock, and the others were the gratuitous holders of the remaining 35 per cent, and he afterwards by purchase obtained over 15 per cent more, and then through his agents took absolute and entire control of the management, construction and disbursement of money—if the management was bad, his agents incompetent, the money wasted, etc., it would seem that he, Farwell, was the only one who could suffer pecuniarily, and could hardly be amenable to the oft-reiterated charge of conspiracy to ruin and wreck a company in which he would be the only sufferer. He is charged, in effect, with wasting his own money and wrecking himself to the extent of 80 or 85 per cent to effect the ruin

of the other 15 or 20 per cent. If such were the facts, Farwell might be benefited by the appointment of a conservator or guardian, but a court of equity could hardly appoint a receiver, as asked, to administer his affairs; nor can the court, by injunction, restrain him from wastefully disbursing his money, or mismanaging his affairs; nor can it, in the absence of stated facts, showing the invalidity of the assessment, restrain its collection. A minority of a corporation is undoubtedly entitled to the interposition of a court of equity to protect it from the illegal aggression of the majority; but the wrongs charged, the imminency of the danger, and the rights of the minority, must be clearly and explicitly stated by apt averments.

The court is asked to decree both deeds of trust, made to secure the money borrowed, absolutely void and of no effect. Why this should be done is not shown. To enable a court to so decree, some invalidity or illegality in their inception and execution must be shown, or a failure or want of consideration. Neither is attempted. A misapplication and waste of the money received in exchange for a security would not afford a court adequate grounds for invalidating the security given.

It follows that the judgment of the court in sustaining the demurrer and dismissing the suit was correct.

Affirmed.

DOWLING, APPELLANT, v. DOWLING, APPELLEE.

1. JUDGMENT AGAINST ESTATE—RIGHTS OF HOLDER.

Where a judgment creditor of a solvent estate postpones enforcement of her judgment in consideration of an assignment to her of one of several notes secured by deed of trust and given to the heir for a debt due the estate, and it is agreed that upon the payment of the note and interest when due, she will satisfy the judgment, she is not compelled to exhaust her remedy upon the note as a condition to her right to enforce the judgment against the heir.

2. HEIR—LIABILITY OF.

The heir into whose possession an estate has come is to be excused

from the payment of its debts only upon showing an insufficiency of assets.

3. ESTOPPEL.

The doctrine of estoppel by election cannot be invoked by one who has suffered no disadvantage by reason of anything in the premises.

Appeal from the District Court of Jefferson County.

THE facts are sufficiently stated in the opinion of the court.

Mr. A. H. DE FRANCE, for the appellant.

Mr. JOSEPH MANN, for the appellee.

RICHMOND, P. J., delivered the opinion of the court.

By the complaint in this case it appears that one Matthew Dowling died intestate on the 5th day of August, 1880; that on the 27th day of December, 1880, letters of administration were issued upon his estate to Jacob D. Carns by the probate court of Jefferson county, Colorado; that on the 5th day of September, 1881, Julia Dowling, appellee herein, obtained a judgment in the county court against the estate of Matthew Dowling for the sum of \$405.50; that on or about January 2, 1882, \$173.75 was paid on said judgment; that the defendant and appellant herein, Mary Dowling, was the widow and sole heir of Matthew Dowling.

It seems that the personal assets of the estate were not sufficient to pay the judgment and that the defendant, Mary Dowling, took possession of all the estate, sold and realized therefrom the sum of \$2,000, and, it is alleged, promised and agreed to pay plaintiff this judgment. This action is brought to recover the amount due.

By the answer it is alleged that one John Lydon executed and delivered to Mary Dowling as widow and heir, for a debt due the estate, four promissory notes, and secured the payment of the same by a deed of trust upon lands in the county of Jefferson; and that on the 30th day of August, 1884, Mary Dowling transferred one of these promissory notes to Julia Dowling, which was in words and figures as follows:

“\$200.

GOLDEN, Colorado, May 15th, 1884.

“One year after date I promise to pay to the order of Mary Dowling two hundred dollars, payable at Golden, Colorado, with interest at the rate of five per cent per annum from date until paid. Interest payable at maturity. Value received.

JOHN LYDON.”

That at the same time and contemporaneous with the delivery of said note the following instrument was executed by Julia Dowling:

“Received of Mary Dowling this day a promissory note executed by John Lydon to her for the sum of two hundred dollars payable on the 15th day of May, 1885, and which note is secured by a trust deed. Now if said note and interest is promptly paid to me when due then I agree to cancel and release the judgment I obtained and hold against J. D. Carns, administrator of the estate of Matthew Dowling, deceased, for the sum of four hundred and five dollars and $\frac{50}{100}$ dollars, entered in the probate court of Jefferson county, Colorado, in the month of September, 1881, and then the said Mary Dowling shall have a clear receipt for said judgment.

“GOLDEN, August 30th, 1884.

JULIA DOWLING.”

Thereafter, as it appears and is admitted by the agreed statement of facts, in order to pay the notes so executed by John Lydon, proceedings were instituted by the heir and widow under the deed of trust, and the real estate therein mentioned was sold, and the sum of \$500 realized from said sale, which was sufficient to satisfy two of said notes, and the sum of \$59.30 was applied upon the third then held by appellant.

The cause was tried to the court a jury being waived, and the court found that Julia Dowling, the appellee, was indebted to Mary Dowling, the appellant, in the sum of \$418.91, and rendered judgment for this amount.

To reverse this judgment it is insisted by appellant that she was under no legal obligation to pay the judgment sued

upon ; that it was the debt of another and no promise was made in writing to pay the same ; that if such obligation existed it was fully discharged by the contract of August 30th, 1884 ; that by said contract it became the duty of Julia Dowling to use due diligence in the collection of the note, and having failed to do so and neglecting to return the note, she was estopped from recovery for the balance due upon the judgment.

This was a claim against the estate of Matthew Dowling which was evidenced by the judgment obtained. Mary Dowling became the sole heir and absorbed the entire assets of the estate, but for the purpose of paying the same she transferred the above mentioned note and accepted the conditional receipt above recited.

True it is that the note was secured by the deed of trust, and it is equally true that three other notes were secured with this one by the same deed of trust, and that Mary Dowling held these three notes and advertised the property mentioned in the deed of trust for sale, under and by the terms of it and purchased it for the sum of \$500, canceling two and a part of the third note, leaving the note transferred by her to Julia Dowling wholly unpaid and unsatisfied.

We are clearly of the opinion that the appellant being the sole heir of her deceased husband and having secured, sold and converted to her own use all of the personal and real estate of her husband, realizing therefrom more than sufficient to pay the judgment against the estate, she became liable for the judgment. It is not necessary that a promise either verbal or written should have been executed by her in order that the obligation should attach : The transaction does not come within the provisions of our statute of frauds. The assignment of the note and delivery of the above mentioned receipt, clearly and unmistakably indicate the contract made between the parties, and that there is no mistaking the purpose and intention of both parties at the time when this contract was made. Here there was a delivery of a note payable one year after date for the sum of \$200 by Mary

Dowling to Julia Dowling in satisfaction of an acknowledged claim against the estate when paid, of which she was the sole heir. This was a claim payable out of the assets of the estate of Matthew Dowling prior to any distribution to heirs, and relied upon by appellee when she accepted the note in question; but to prevent any unnecessary expense and interruption in the settlement of the estate she agreed to accept this note and postpone her enforcement of judgment for the period of time when the note would become due. The estate was responsible for it, and the duty devolving upon the sole heir was to pay it, and she could only excuse herself by showing an insufficiency of the assets. *Green v. Taney*, 16 Colo. 398.

The note was secured, with several other notes, by a deed of trust, and it is fair to assume that the understanding was that this note would undoubtedly be paid at its maturity, because it was so secured, and because the other notes secured by the same deed of trust were held by the assignor of this note. And as expressive of the understanding and agreement between the parties the above receipt was executed.

It seems to us there can be no escaping the conclusion that both parties understood that this note was in the nature of a collateral promise, which if paid, the judgment against the estate would be released and canceled. The language of the receipt is plain and simple, and is not susceptible of the constrained construction placed upon it by appellant's attorney in his brief: "Now if said note and interest is promptly paid to me when due *then* I agree to cancel and release the judgment I obtained and hold against J. D. Carns, administrator of the estate of Matthew Dowling, deceased, for the sum of four hundred and five and $\frac{50}{100}$ dollars entered in the probate court of Jefferson county, Colorado, in the month of September, 1881, and *then* the said Mary Dowling shall have a clear receipt for said judgment."

Can it be said that under a contract so worded it was the duty of Julia Dowling to proceed to foreclose under the deed of trust at the time of the maturity of this note, or is

it not a fact that the delivery of the note properly indorsed, coupled with the receipt, indicated that in case Lydon paid the note then the judgment was to be released and canceled and satisfied in full.

It occurs to us that one would have to labor by the lamp and travel into the realms of imagery ere any other conclusion could be reached. There is nothing in the transaction, as developed by the record, that would warrant us in placing the appellee in the position of holding this paper as commercial paper, to be dealt with and handled as such. She was under no obligation to press collection by suit or sale of the real estate. She evidently received the note understanding and believing, and it was undoubtedly so understood by appellant, that, in view of the fact that the note in connection with others was secured by a deed of trust upon land amply sufficient to satisfy in full all of the notes, unless it was paid, the judgment would stand against the estate for the payment of which Mary Dowling would ultimately become personally responsible. She had been induced to suspend enforcement of her judgment against the estate by the assignment of the note with assurances that unless it was paid she in no sense forfeited her claim embraced in the judgment.

It is true she did not tender the note at the time of the institution of the suit to recover on the unpaid balance of the judgment, nor do we think she was obligated so to do. It was not delivered as payment nor accepted by the appellee in satisfaction of the judgment, unless John Lydon would keep his promise and pay the same upon maturity. His failure to do so left the judgment intact and the note would, upon payment of the judgment, become the property of the appellant and she would be entitled to its possession.

The contention that she had made the note her property by holding possession of it after maturity is without force.

For, as has heretofore been said, we are clearly of the opinion that she was entitled to hold it until the judgment was satisfied. The doctrine of election and estoppel cannot be

invoked in behalf of appellant, as she suffered no disadvantage, having acquired by purchase all of the property of John Lydon in part satisfaction of paper held by her. Hence if the note had been returned at maturity she would have been in no better position than now.

Appellee did not occupy the position of one dealing in commercial paper, and the law controlling the transfer and assignment of negotiable paper has no application to the relation between these parties.

We think the finding of the court was correct. The judgment must be affirmed.

Affirmed.

UPON REHEARING.

PER CURIAM. After mature and thorough consideration of the briefs of counsel for appellant and appellee in this cause we have reached the conclusion that the former opinion should stand as the opinion of the court

The judgment is accordingly affirmed.

Affirmed.



THE DENVER CITY RAILWAY COMPANY, PLAINTIFF IN ERROR, v. THE CITY OF DENVER, DEFENDANT IN ERROR.

1. FINDINGS OF FACT MUST BE UPON EVIDENCE.

The convictions of the judge based upon personal observations, cannot take the place of competent evidence.

2. CONSTITUTIONAL LAW—TAXATION.

The Constitution (art. 10, sec. 3) requires uniformity of taxation upon valuation.

3. CONSTITUTIONAL CONSTRUCTION.

A rule or mode of taxation of property having been prescribed by the Constitution, all others are thereby excluded.

4. MUNICIPAL POWERS—LICENSE, FEES, ETC.

A municipal authority cannot, under its power to license, regulate and tax an occupation or business, tax the property engaged in such business.

5. MUNICIPAL DISCRETION.

When a city is vested with power to impose license fees, without express limitation as to the amount thereof, much is left to municipal discretion, and its exercise will not be interfered with by the courts unless it is abused. *Semble*, an injunction should never be issued against a municipal corporation unless the right and power are free from doubt.

6. JURISDICTION OF THE COURT OF APPEALS.

The court of appeals is not a court of final jurisdiction when constitutional questions are involved. Its judgment upon such questions is subject to review by the supreme court.

Error to the District Court of Arapahoe County.

Messrs. WOLCOTT & VAILE and Mr. H. F. MAY, for plaintiff in error.

Mr. F. A. WILLIAMS and Mr. GREELEY W. WHITFORD, for defendant in error.

REED, J., delivered the opinion of the court.

Suit was brought in October, 1889, against the city of Denver by the plaintiff in error, a corporation originally incorporated by an act of the territorial legislature in 1867, under the name of the Denver City Horse Railroad Company. In 1872 by an act of the territorial legislature the name was changed to Denver City Railway Company, the corporation retaining all the powers and privileges formerly possessed. It constructed various lines of street railway and operated a large number of horse cars upon them.

It is alleged in the complaint that by the charter the city of Denver was, among other powers, given the power by an act of the general assembly of March 16th, 1885, "exclusively, to license, regulate and tax any or all lawful occupations, business places, amusements, and may fix the rate and charges for the carriage of persons and property within the city by licensed hackmen, omnibuses, carriagemen, draymen and expressmen."

By an ordinance of the city passed in 1886 it was declared unlawful to operate street cars without having ob-

tained a license ; by another section, the license for each street car operated was fixed at \$10 per annum. In the year 1888, the license fee was raised by a city ordinance to \$25 per annum for each car. It is further alleged that prior to the passage of the ordinance of 1888, plaintiff had each year paid the license fee of \$10, and that since the ordinance of 1888, it has at all times been willing and still was willing at the time of bringing the suit to pay a license fee of \$10, but refused to pay the license fee of \$25 ; that \$10 was ample to pay the cost of license, police protection and supervision, and that all in excess of that amount was a tax upon the property, void and illegal. That the city was about to enforce the ordinance and collect \$25 upon each car, and arrest the drivers and operators of each car unless the same was paid ; and asking an injunction to restrain the collection, arrests, etc. An answer was filed and the case tried to the court without a jury.

The right to license the cars and fix the price of such license at an amount sufficient to cover the expense of police supervision is conceded, consequently no question is raised in regard to the legality of the ordinance under which the right is asserted. The question in the first instance is purely one of fact, whether the \$25, the amount charged, was excessive. The abstract presents no evidence whatever, nor are we informed that any was taken. The case appears to have been twice heard by the court, and its finding upon each hearing set out at length in the abstract furnished ; the finding of fact on each hearing being the same, but the finding of law, in the second instance, differing from that in the first. In both the court found a \$10 license insufficient, and a \$25 fee excessive, and fixed, as a compromise, \$17.50 as the proper sum to be exacted. Plaintiff adopts the finding of fact in so far as it declares \$25 to be excessive, consequently does not find it necessary to have that end of the case reviewed, but asks that the finding of law be reviewed. No cross errors are assigned.

There is nothing in the brief or argument of counsel for

plaintiff to show that it has adopted or is willing to adopt the \$17.50 as the proper charge, nor is there anything to show that the defendant is not willing to accept the \$17.50, but it not having been accepted and acted upon by either, the presumption is that it was rejected by both, and plaintiff is in the position of adopting the finding that \$25 was excessive, without adopting the finding that the sum of \$17.50 was correct, but still adhering to the allegation that \$10 was sufficient, while attempting to avail itself of the finding that \$25 was excessive to the amount of \$7.50. This seems an anomalous and unprecedented manner of presenting a cause for review.

In the first opinion of the court it is said, "But I have been conversant with the lines of railroad and cars of the plaintiff in this city for a number of years, and I know of my own knowledge, of which, of course, I can't divest myself, that the police regulation cannot, from the testimony offered, make it necessary for the payment of \$25 on each of these cars," etc. This is rather a poor basis upon which to review the finding of fact. It is needless to say that the convictions of the court, from personal observation, cannot take the place of competent evidence. In our opinion the finding of law is so absolutely dependent upon the finding of fact, the law so dependent upon the fact, that we can hardly review one without the other.

It is urged by counsel of defendant that under its charter it has the right not only to tax street cars, by license, for sufficient to cover the cost of police control and supervision, but also by *license fee*, to tax the business of running street railroad cars for the purpose of municipal revenue. This contention is adopted by the court, and after having found \$25 excessive to the extent of \$7.50 in both findings, in the latter holds:

"First.—That the license for police regulation does not, under the testimony offered, justify a greater license than \$17.50 per car, as heretofore found, but that the wording of the city charter gives the city the right to tax as well as to

license for police regulation, and that the charter of the plaintiff company approved January 10th, 1867, in no way exempts it from paying such tax.

“Second.—That the city council, having the power to assess said tax at the sum of \$25 per car, and having elected to do so, that the same is legal.”

This finding cannot be sustained. The right to tax a “*business*” by license cannot be extended so as to cover a tax levied by license upon property used in the business. An extended discussion on this proposition is unnecessary. The assumption is in direct conflict with constitutional provisions and prohibition. Street cars, horses and all personalty connected with them, belonging to the corporation are, by the operation of general laws, subjected to taxation for state, county and municipal purposes, upon valuation and upon a fixed basis, like property used in the prosecution of other business.

It is declared in the state constitution, art. 10 sec. 8, “All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations *as shall secure a just valuation for taxation of all property, real and personal.*” The assumed right to discriminate, to double tax the same property, first, generally upon valuation for purposes of revenue; second, to tax, under the power to license, without valuation, at the will and caprice of the city council for purposes of revenue, cannot be sustained. It is in direct conflict with the constitution which requires uniformity of taxation *upon valuation*. If the contention is to prevail, it might result in prohibiting a legitimate business, and confiscation, by discriminating, and double taxation of the personal property used in the prosecution of the business.

In *Palmer v. Way*, 6 Colo. 110, it is said: “A certain mode being prescribed, all other modes are excluded, and any act of the legislature assuming to authorize the levy and collection of taxes *by a mode that ignores the principles of valua-*

tion and uniformity, is null and void." *Wilson v. Chilcott*, 12 Colo. 602; *People ex rel. v. Henderson*, 12 Colo. 371; *Carlisle v. Pullman Co.*, 8 Colo. 327.

We think the court erred in finding the law to be, that the defendant could by way of license, tax the property of plaintiff for revenue as well as for police supervision, and that this finding must be reversed. An injunction was asked restraining the city from in any way proceeding to collect more than \$10. It was also asked that the ordinance fixing license at \$25 be declared void.

In the absence of evidence and established facts, the ordinance, as above stated, cannot be declared void. Whether or not the license fee was exorbitant we have no means of judging. The fee cannot be fixed accurately. The duty the city government owes the people, and its liabilities for damage for failure in proper supervision, are factors to be considered, and require it to put the fee at a figure amply sufficient to cover liability and pay for careful supervision. What the actual cost of supervision was, was a matter peculiarly within the knowledge of the city government. The city council is a deliberative, administrative body, chosen from the people, legislating under the charter upon subjects with which they are supposed to be familiar. This court cannot interpose its opinion and guess at a cost of administration, nor take the judgment of the court below, as against the judgment of the city council. The city council, by ordinance, estimated the cost and responsibility on each car at \$25—appellant insists upon \$10—the court compromises and fixes it at \$17.50, which finding is not adopted. It is true there is a discrepancy of \$7.50, that difference between the judgment of the court and that of the city. Which is right, we cannot say.

In *Cooley on Taxation* (2d ed.), 598, it is said: "But the limitation of the license fee to the necessary expenses will still leave a considerable field for the exercise of discretion, where the amount of the fee is to be determined."

In *Van Baalen v. People*, 40 Mich. 258, it is said: "The

question as to the reasonableness of the amount of the license fee will not admit of nice calculations, and it would be futile to require anything of the kind." Courts will not review municipal discretion in imposing license fees, where it has not been abused in this instance. In many cities double the amount has been held not to be excessive. *Allerton v. Chicago*, 9 Biss. (U. S. C. C.) 552; *Railway Co. v. Phila.*, 58 Pa. St. 119; *Railway Co. v. Phila.*, 101 U. S. 532.

The general rule appears to be that courts will not interfere with the discretion of municipal bodies unless there is an evident abuse of power. Plaintiff alleges an abuse of \$15; the court finds \$7.50. Should we adopt the court's finding, plaintiff could not obtain the relief asked. In our view, the case presented is peculiar—there is a correct judgment denying the injunction and sustaining the ordinance, but based upon errors of law. It is very doubtful whether the wrong, if there is one, can be reached by injunction or remedied in a court of equity. The authorities seem to concur in saying, that a writ of injunction should never be issued against a municipal corporation unless the right and power are free from doubt. 2 High on Injunc. §§ 1240, 1244; *Poyer v. Des Plaines*, 123 Ill. 111; *West v. Mayor of N. Y.*, 10 Paige, 539; *Eldridge v. Hill*, 2 Johns. Ch. (N. Y.) 281.

It is apparent, that under the case as made in the complaint, a court of equity was powerless to declare the ordinance void and enjoin proceedings for its enforcement.

The suit should be dismissed.

Reversed.

ON APPLICATION FOR REHEARING.

REED J., delivered the opinion of the court.

Both parties to the controversy have filed petitions and elaborate briefs and arguments asking a rehearing.

The application of plaintiff is based, principally, upon the fact that the court below found as a matter of fact that

\$17.50 was an adequate license fee, and that \$25 was excessive, and that no exception having been taken, such finding was conclusive upon this court. Had there been any authoritative finding of an important fact involved, it might be correct. The fact incidentally found and presented as a sort of compromise in no way affects the result to be reached. The right to collect any license fee depends upon the validity of the ordinance authorizing it, and the amount of the fee is also dependent upon the ordinance. There were two ordinances, the earlier one providing for a fee of \$10 upon each car, the subsequent, for \$25. The right to demand and collect a fee is conceded by the plaintiff, but it contends that \$10 is enough and \$25 is excessive. It adopts, and wishes the court to adopt, such findings only for the purpose of abrogating and invalidating the latter ordinance of \$25, and relegating it to the \$10 ordinance, not adopting the finding as a basis of payment. Had the court found and decreed the \$25 ordinance void, by reason of excessive charges, another question would have been presented; but while finding \$25 excessive and \$17.50 sufficient, it in the same judgment finds "That the city council having the power to assess said tax at the sum of \$25 per car, and having elected to do so, that the same is legal." Having found that the fee of \$25 was legal, it is unimportant upon what evidence, if any, it found \$17.50 sufficient. We do not see how, without adopting it as a basis of payment, it can avail the plaintiff, or how it is regarded by the court, becomes important. To adopt the finding of fact as urged would abrogate both ordinances, one for being excessive, the other for not being sufficient.

Without more data or evidence, we do not feel justified in interfering with the functions of the city council in matters peculiarly within their knowledge, nor shall we do so under any circumstances, unless its action is clearly flagrant and oppressive. In this instance the limit attempted to be established is so finely drawn, it must be apparent that it was more in the spirit of an attempt to compromise or arbitrate than an authoritative judicial opinion.

The petition of plaintiff in error must be denied.

The petition of defendant in error must also be denied.

This court having found the ordinance valid and having asserted the right of the city, under the ordinances, by virtue of its police power, to collect a license fee of \$25, does not consider it obligatory upon it to go further and decide questions not involved. Nor are we disposed to recede from the construction of the constitution as stated in the opinion, nor to adopt the conclusions of the district court and the contention of counsel, that the property of the corporation can be doubly taxed for revenue; first, upon its assessed value, and second, upon license fees. We think that to permit it would not only be inequitable but in direct conflict with the constitution.

We do not regard the late decision of the supreme court in *Denver City v. Knowles*, handed down since the opinion in this case was written, as in any way controlling this case or in conflict with it; though the subjects are germane, both being in regard to the power and constitutional limits of the right to tax, the questions are in no way identical, and the basis of each and the right to tax depend upon principles of law widely different in their origin and application.

This is not a court of final jurisdiction when constitutional questions are involved. The supreme court will undoubtedly be required to pass upon the constitutional question, and as the judgment of this court is only intermediate, it can only be a basis to enable parties to obtain a review, which we will gladly facilitate.

Denied.

THE DENVER, TEXAS & GULF R. R. Co., APPELLANT, v.
DE GRAFF, APPELLEE.

1. STATUTORY ACTION.

A party injured by fire set out or caused by the operating of a line of railroad, has an action for his damages, and is not required to avail himself of the provision of the act of March 31st, 1887.

2	42
2	162
2	49
5	243
7	129

2	49
25c	528

2	42
26s	493

2	42
34s	233

2	42
378	301

2. STATUTORY CONSTRUCTION.

The object of the amendment of the statute (Sess. Laws 1887, p. 368) was to facilitate adjustment of losses and *prima facie* establish the amount of damages sustained by reason of the fire.

3. PLEADING—UNDER STATUTE.

A complaint containing a statement of facts constituting a cause of action under the statute is sufficient. No reference to the statute under which the action is brought is necessary.

4. NEGLIGENCE—WHEN NOT REQUIRED TO BE SHOWN.

As to the contention that no recovery could be had in this action without proof of negligence, *held*, that the necessity of such proof is obviated by the statute. *U. P. R. R. Co. v. DeBusk*, 12 Colo. 296, so construing the act and declaring it to be constitutional, followed.

5. PROOF—QUANTUM OF.

In cases of this kind, juries should not be allowed to infer or presume, for want of positive proof to the contrary, that the fire was communicated by the operating of the railroad. The proof required upon this point must be sufficient to exclude the probability of the fire having been caused by some other means.

6. NEW TRIAL—WHEN GRANTED.

Where there is no competent evidence upon which a verdict could have been predicated, and where it must have been the result of prejudice, it should be set aside.

7. OFFERS TO COMPROMISE.

An unaccepted offer to compromise is not admissible in evidence.

Appeal from the District Court of El Paso County.

Messrs. WELLS, MCNEAL & TAYLOR and Messrs. TELLER & ORAHOD, for appellant.

Mr. T. A. McMORRIS, for appellee.

REED, J., delivered the opinion of the court.

This was an action at law brought by appellee to recover damage for the burning and consequent loss of near 2000 acres of native grass or pasturage, within an enclosure or fences, in October, 1886, the fire being alleged to have originated from fire escaping from the engine of appellant at a point from one to three miles distant from the grass consumed. The extent of the territory burned over was conceded, and there is no conflict of testimony in regard to the value, the defendant below introducing no testimony upon the point.

The jury found for the plaintiff (appellee) in the sum of \$641.66, and judgment was entered upon the verdict.

Prior to March 31, 1887, the following statute was in force, Gen. Stat. sec. 2798, p. 812:

“That every railroad company operating its line of road or any part thereof within the state shall be liable for all damages by fire that is set out or caused by operating any such line of road or any part thereof, and such damages may be recovered by the party damaged by the proper action in any court of competent jurisdiction,” etc. By an act of the above date, (Sess. L. 1887, p. 368), the above statute was re-enacted and amended so as to allow the party damaged and the railroad company, jointly, to appoint appraisers to estimate the damage caused by the fire, etc. The amendment need not be considered, as the act was passed several months after the alleged burning occurred. The object of the amendment was to facilitate adjustment of losses, and *prima facie* establish the amount of damage sustained.

It has never been held, nor can it be, that a party damaged must avail himself of the provision as a condition precedent to right of recovery.

Counsel for appellant seem to have been mistaken in supposing the statute above cited to have been repealed by the act of 1887. We can find no evidence of a repeal, directly or by implication. In substance it was enacted in 1874, passed in its present form in 1877, and amended and added to in 1887. The statute is simply declaratory of the common law, except that it eliminates the question of negligence—which was at common law an important factor—and makes the liability absolute, “*if the fire was set out or caused by operating any such line of road,*” regardless of the question of negligence.

It is contended by appellant, in argument, that no reference having been made in the complaint to the statute, “the plaintiff is therefore conclusively presumed to rely upon the common law.” With this we cannot agree. It was a general statute—need not be pleaded, or referred to. If the com-

plaint stated a cause of action under the statute, that was sufficient.

Second. It is contended, that no recovery could legally be had for want of proof of negligence. We think, as above stated, that the necessity of such proof was obviated by statute. This conclusion is warranted by the language of the statute, it being so plain that no construction is necessary. This position is, also, we think, sustained by the supreme court in *U. P. R. R. Co. v. De Busk*, 12 Colo. 296, where the statute was also declared constitutional.

In regard to the proof necessary to establish the principal fact, viz., that the fire was communicated by the operating of the road, we think the doctrine of inference—from circumstances—has been carried as far or farther than was legally allowable, without in any way criticising adjudicated cases. See *Railway v. De Busk*, *supra*.

We think the rule should be limited, not extended. Country juries have invariably shown themselves inimical to lines of roads operated adjacent to, or through their property, and probably in most cases, for satisfactory reasons; but under an ironclad statute, preventing the corporation from exonerating itself from blame in cases of fire, juries should not be allowed to infer or presume the fire to have so originated, for want of positive proof of some other origin, and base a verdict upon inference or guess. The fact of the origin of the fire, like any other material fact, should be established; and while the jury, within certain limits, may be left to infer the fact from the circumstances proved, such proof should be sufficient to rebut the probability of the fire having originated in any other manner. Corporations are certainly entitled to legal protection to this extent. Fires may, either intentionally or accidentally, originate in many ways, especially in the fall. That devastating fires occur frequently, perhaps annually, in districts remote from railroads, is a fact established by experience and observation; hence, the necessity of limiting inference and presumption.

The testimony in this case was clearly insufficient to establish the fact that the fire originated in operating the

railroad. That it originated somewhere in its vicinity is established. The testimony of reliable witnesses, who resided near it or were near it, particularly that of Mr. Erickson, whose residence was nearest, was that on the next day they drove over the ground that had been burned over, to ascertain in that way where the fire originated, and found it had been burnt to a point "but a few steps from the railroad track." This might have resulted had the fire originated at any other point in the vicinity. Mr. Higgs, who was at work upon a barn for Erickson, saw the smoke—could not tell in what direction it was—judged to be east of Erickson's house. "I recollect seeing a train of cars pass that day. It was before I saw the smoke. It seems to me it was directly after dinner. * * * I saw the smoke probably half an hour after I saw the train, or it may not be so long." This was all the evidence connecting the railroad with the burning, except that of James Sherman, which was so "hazy," contradictory and improbable, and in one particular, impeached, that it should have been entirely ignored by court and jury. He seems to have been the "missing link" that was picked up in some manner, and put in to supply an important link in the evidence. He could give no intelligent account of himself; said that at that time he was employed by a man residing at Chico—had been in such employment two months—boarded with his employer, yet could not remember his name, etc., and that on that particular 15th day of October he was on horseback at the point and at the time the fire originated; that it was about 12 o'clock, noon; that he was hunting two horses that had strayed; that he did not expect to find them in that locality; that he was going to Colorado Springs, where he had no business, etc. He testified that a train passed him 150 or 200 yards distant. "I saw the fire catch into the grass. It caught from the train as I supposed." On cross-examination, he said: "I met the train and passed on, and then I looked back and saw the fire burning. Before I looked back I had passed about a quarter of a mile I guess. At the time the fire caught the grass, I can't say whether I was just looking at the train or not. I was coming into the

Springs and the train passed me. A short time after it passed, I looked back and there was a fire in the grass—there was no fire there when I passed.” The two statements of the same fact are so at variance as to be worthless. He also testified that he stopped that night at the “Spalding House,” which was contradicted by the clerk and hotel register. He also said: “It was a very windy day if I remember right.”

Erickson testified that when he first saw the smoke, “There was but little wind at that time * * *. The fire burned slowly for an hour and a half and then a strong wind started up and it burned fast.” Taken as a whole his testimony was entitled to no credit whatever.

There was no legal basis for the verdict—no competent evidence upon which it could be predicated, and must have been the result of prejudice, and should have been set aside by the court. The letter allowed in evidence by the court over the objection of the defendant, from Grover, superintendent, should have been rejected. It contains no acknowledgment of any liability whatever; offers to pay \$200 rather than have litigation over the matter. The rule is well settled that offers of this kind, unaccepted, are not competent evidence. What effect it had, if any, cannot be known. The jury may have regarded it as conclusive, and without instructions, as an admission of all facts necessary to be proved, except as to the amount of damage.

For the causes stated the judgment must be reversed and cause remanded.

Reversed.

APRIL TERM, 1892.

BUSH, ET AL., APPELLANTS, v. KOLL, APPELLEE.**CONTRACT FOR SATISFACTORY SERVICE—HOW CONSTRUED.**

The appellee entered into a contract with the appellants, by which he was employed for one year at a stated monthly salary, and by which he agreed to give his entire attention to the business in which he was employed, and "to render good and satisfactory service;" *held* that his employers might discharge him at any time his services were unsatisfactory to them, without incurring liability in damages. The contract required performance not only of such services as his employers ought to have been satisfied with, but such as actually were satisfactory to them. **BISSELL, J.**, dissenting.

Appeal from the District Court of Arapahoe County.

THE facts are stated in the opinion of the court.

Messrs. TELLER and ORAHOD, for the appellants.

Mr. GEORGE F. DUNKLEE and **Mr. O. E. JACKSON**, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

By the complaint in this case it is alleged that the plaintiff entered into the defendants' employment for the term of one year, in pursuance of a contract in writing which is in words and figures as follows:—

"This agreement made in duplicate, this 20th day of August, A. D. 1888, between W. H. Bush, and W. S. Morse, partners under the firm name of 'Bush & Morse,' parties of the first part, and John Koll, of Denver, Colo., party of the second part.

"Witnesseth, that the said parties of the first part have

this day employed John Koll as chef at the Windsor Hotel, for the term of one year, at a monthly salary of one hundred and thirty dollars (\$130).

"The said party of the second part agrees to give his entire attention to the business for which he is employed, and to render good and satisfactory service.

"In witness whereof, the parties have hereunto set their hands and seals this day and year above written.

"(Signed,)

WILLIAM H. BUSH, (SEAL.)

W. S. MORSE, (SEAL.)

JOHN KOLL, (SEAL.)"

On the 20th day of August, 1888, the plaintiff entered the service of the defendants under the contract, and so continued in their service until the 9th day of February, 1889.

On the 9th day of February, 1889, defendants without cause discharged the plaintiff and have since refused to employ him for the remainder of the term mentioned in the contract.

That thereby the plaintiff has lost the wages which he would have obtained from said employment and which the defendants have wholly refused to pay, and the plaintiff has been unable to obtain other employment, wherefore he demands judgment in the sum of \$827.66 besides costs.

Defendants answer, admitting that they entered into the contract substantially as stated in the complaint, but deny that the plaintiff faithfully discharged his duties according to the contract, or that he performed all or any of the terms or conditions of the contract on his part, or that he was ready or willing to continue in such service or to comply with all or any of the conditions of the contract; deny that on the 9th day of February, 1889, the plaintiff was ready or willing to remain in such service or to perform the conditions of the contract, or that they refused to suffer plaintiff to continue in their employ; deny that they wrongfully discharged him or that they refused to re-employ him for the term mentioned in the contract.

They further allege that at the time plaintiff quit their employment they paid him in full for all services rendered.

Defendants by further answer and counterclaim allege that the plaintiff while so engaged in defendants' service as chef, and about the time when dinner was being prepared for the guests of the hotel, wrongfully and fraudulently refused to go on with his work, and to discharge his duties under said contract, and aided, abetted and counseled the other employees of defendants then engaged in the kitchen and dining room of the hotel to refuse to work for defendants. This defense sets out the number of guests in the hotel, the number of employees; and, that by reason of the acts of plaintiff they were greatly inconvenienced and were necessitated to employ other servants, wherefore they claim damages in the sum of \$500.

They further allege by way of defense, upon information and belief, that the plaintiff was able to obtain further employment in the line of his vocation as chef in a hotel.

The cause was tried to a jury, and judgment rendered for the plaintiff in the sum of \$413.83.

The testimony in the case seems somewhat conflicting, but we do not conceive it to be necessary to set it out fully in this opinion.

Koll testifies that he was discharged without cause; that he was performing the services faithfully under his contract, and as he believed, giving entire satisfaction.

From the testimony of Mr. Bush it appears that his services were not satisfactory; that owing to the fact that the defendants had concluded to change the character of the cooking apparatus from a coal range to a gas range, the plaintiff became dissatisfied, and growing out of this change he so conducted himself and so run the culinary department of the hotel as to impose extravagant costs for gas upon the defendants; that they protested, and he claimed that he was doing the best he could. They insisted that experience and examination, and their personal observation of coal ranges and gas ranges in eastern hotels had thoroughly demon-

strated to them that the gas arrangement was infinitely cheaper and better for hotel service.

Mr. Bush testified that up to the time we made the change of cooking apparatus the service in the kitchen was satisfactory, after we made the change everything went wrong; there was continual trouble in the kitchen, something would be underdone or overdone. I found the burners stopped up with grease. All of my men were under Koll's direction and charge, he was the head of the department. He was chef. Up to the time of the change in the range the service was satisfactory, after that and up to the 9th of February, it was very unsatisfactory, there was a continual jar.

Mr. Morse, the other defendant, testified that after the gas range was put in there was nothing satisfactory about Koll's service or about the kitchen, it was a continual round of trouble all the time, everything was unsatisfactory; the amount of gas used was three times the amount that the manufacturers of the range guaranteed would be necessary to do this same work.

There is considerable testimony on both sides of this controversy with reference to the capacity and utility of ranges to roast meats, cook potatoes, hard and soft boiled eggs, and in fact all of the usual articles that are enumerated upon the hotel menu or bill of fare.

But with all this I think we have nothing to do. Here is a plain, simple, unambiguous contract, susceptible of easy construction, so simple that he who can read and write ought to be able to understand.

The contract is absolute and specific; by its terms plaintiff covenanted that his work should be *satisfactory*, not to himself, but to his employers. That it was not satisfactory is shown by the evidence of defendants and is corroborated by that of plaintiff. Had plaintiff's services been eminently satisfactory to his employers, but his position unsatisfactory to himself he could have quit and they would have been remediless. To retain him in a state of revolt and while

influencing and demoralizing his subordinates was impossible.

It is true that this agreement says that John Koll is employed for the term of one year at a monthly salary of \$130. It is equally true that the other part of the agreement says that he shall give his entire time and attention to the business for which he is employed, and render satisfactory service. Getting down then to the understanding of the individuals when this contract was executed, without utilizing technicalities, I do not think there is any escaping the conclusion that the parties to the contract well understood what they were doing. The testimony shows that Koll had been in the employ of the defendants before; that he had rendered satisfactory service; that he was expected to render satisfactory service. In other words, he was to devote his entire time and attention, as well as his artistic talent, to the service of the defendants, but when that service proved unsatisfactory it was the right of either party to terminate the contract—it was mutual. If this be not true I am at a loss to understand what part the last clause of this contract plays in this drama between masters and servant. That the service was unsatisfactory is demonstrated by the testimony of Bush and Morse. Who else could testify—who else could say whether or not the service was satisfactory. Can it be argued or insisted that Koll was employed to act as chef of this hotel, to manage and control the kitchen and its employees in his own way without regard to the manifest wishes or directions of the defendants, and that when the defendants gave certain instructions concerning the methods and manner of his employment, that he could say I am the servant, but I am employed for a year and for that one year I propose to exact my salary and compel you, regardless of your wishes, to submit to my management and my dictation, to my manners and my methods in running this hotel. I care nothing for your guests or your hotel enterprise, as chef for one year I propose to remain.

It may be argued that the masters in this case were fully

protected, under the general rule governing master and servant, from any such theory as this; that when he failed to perform his services promptly as chef of that hotel, the law would protect the defendants in discharging him. I claim in answer to this that it is the right of the defendants under the contract and the law to determine when that service is satisfactory and when it commenced to be unsatisfactory.

In *Zaleski v. Clark*, 44 Conn. 223, Carpenter, J.; says:—"Courts of law must allow parties to make their own contracts, and can enforce only such as they actually make. Whether the contract is wise or unwise, reasonable, or unreasonable, is ordinarily an immaterial inquiry. The simple inquiry is, what is the contract; and has the plaintiff performed his part of it?" This was a case where the plaintiff undertook to make a bust which should be satisfactory to the defendant. "The case shows," to use the language of the judge writing the opinion, "that she was not satisfied with it. Hence the plaintiff has not yet fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with, but to make one that she would be satisfied with."

It seems to me that this reasoning is applicable to the case at bar.

In *Brown v. Foster*, 113 Mass. 186, Devens, J., rendering the opinion of the court said:—"There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant upon a day certain a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept and promptly returned the same. * * * And even if the articles furnished by him were such that the other party ought to have been satisfied with

them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. * * * When an express contract like that shown in the present case was proved to have been made between the parties, it was not competent to control it by evidence of usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect."

In the case of *Daveny v. Shattuck*, 9 Daly, 66, it was held that where "A servant was employed upon trial for a week, with a promise that, if she suited, the employment would be continued through the summer months and until September 1st. Before the end of the week, the employer having declared that she suited, the servant said: Then, as long as I suit you, there is no fear for the summer months; to which the employer responded affirmatively. Held, that there was not an absolute employment until September 1st, but merely a conditional one, dependent upon the servant continuing to suit the employer."

In the case of *Evans v. Bennett*, 7 Wis. 351, it was held that, "When one party agrees to work for another at a certain rate of wages per month, and either party is at liberty to put an end to the agreement at any time, the servant is entitled to recover at the stipulated rate for the time he serves, though he quits of his own motion."

The foregoing case is certainly analogous to the case at bar with this exception, that in that one there was no written contract, but an oral agreement, and in this case there is a written agreement, an express contract whereby the individuals obligated themselves, first, the plaintiff to render satisfactory services; and, second, for which services so satisfactorily rendered the defendants are bound to pay at the rate nominated in the agreement for the period of one year.

It is true that the jury were instructed by the court that if they believed from the evidence that the services of Koll were unsatisfactory to the defendants they should find for the defense. In this the trial judge took the view of the contract that I am now endeavoring to demonstrate as being the correct one. Yet notwithstanding the instructions, notwithstanding the testimony of Bush and Morse, notwithstanding the fact that Koll was discharged, notwithstanding it appears that his services were not satisfactory to the defendants, the jury still taxed the defendants for the entire year or the term specified in the contract. Candidly, I think that there is no case that has come before my inspection and examination wherein the verdict of the jury demonstrates the fact to be that their conclusion was the result of prejudice. For, as is well said in *Zaleski v. Clark, supra*, the defendant and not the court is entitled to judge of whether or not the work is satisfactory. And in keeping with this declaration the defendants by the contract have the right of terminating the contract when the services were not satisfactory. I do not think it necessary to consider the counterclaim as, in my judgment, under the testimony it is without merit. I am clearly of the opinion that the verdict of the jury is unsupported by the evidence, and that the judgment of the court should be reversed.

REED, J., concurred.

BISSELL, J., dissenting.

I should be content to withhold my concurrence in the conclusions announced in this case, but for the opinion expressed as to the proper rule to be applied in the construction of the contract contained in the record. The apparent necessity to state what I believe to be the law on this subject leads me to fully state my views concerning this controversy.

The contract is set out in the principal opinion. The issues raised by the pleadings can be fairly gathered from it

if it be read strictly with a view to ascertain what the contention was. Unless attention be specifically directed to that point, what I believe to be an important element in the settlement of the dispute is liable to be overlooked. I will therefore first state what I believe to be the issue, and demonstrate as far as may be the mistake committed by the trial court in submitting one question to the jury, and the absence of right on the part of the appellants, Bush & Morse, to insist that the judgment was wrong because against what they contend is the law, in which position they are sustained apparently by the decision of this court.

It is their contention that the contract is one, substantially one, at their will and option, and that therefore no right of action could accrue to the plaintiff if they saw fit to terminate his employment. I shall discuss the legal aspect of this proposition subsequently. At present I am only concerned with a statement of the situation of the case with reference to this issue. There is no such element in the controversy presented to this court for adjudication. The suit is an action by Koll to recover his wages for the balance of what he says is an unexpired term of employment. He alleged the contract, a rendition of services to a specified date, a discharge, and a consequent damage, shown by proof of the amount of his unearned wage, with efforts to obtain employment and a failure. To this cause of action there might evidently be several defenses. In fact, there was but one, and this rested in a denial of the discharge. The denial was undoubtedly coupled with other denials of the various elements or items which on proof would demonstrate the plaintiff's injuries. This simple statement shows that there was no issue presented relating to the right of the defendants to end the contract at their will, and for this reason, if for no other, the cause cannot be reversed on the basis adopted.

I maintain further, that if it be conceded, *ex gratia*, that the case presented the question, the appellants are still concluded by the findings of the jury, under the testimony and the instructions of the court. I am not prepared to overturn

a well settled and thoroughly established rule of the courts of this state, which inhibits appellate tribunals to interfere with the verdict of a jury when it rests upon conflicting testimony. If it be insisted that the case is one exhibiting gross prejudice, the proposition should be made the subject of satisfactory demonstration. It is neither demonstrated in the opinion, nor do I believe the case fairly stated will admit it. Bearing in mind that this is not a suit to recover wages earned during a period of service, to which there was a defense of unsatisfactory service, and that it was not a case of a suit for wages accruing during an unexpired term where the defense was a rightful discharge under the contract, let us see how the case stands on the proof under this rule. Premising that of necessity there could be no evidence of dissatisfaction with services which had never been rendered, it is possible that the case would admit of testimony to show the performance of the contract by the plaintiff during the time he worked. This however is exceedingly doubtful, because the law presumes that the service was satisfactory, since there was no termination of the contract, and no attempt on the part of either to end the engagement. This presumption of law was well supported by the plaintiff's own testimony, who made oath to the expressed satisfaction of the firm. It cannot be said with strict observance of the language and force of the printed testimony that this was denied by Bush & Morse. The only testimony tending in this direction is testimony of this description: "I put this gas range in, and there seemed to be a disposition on the part of every one in the kitchen to fight it. *They* were not satisfied; there seemed to be a disposition on the part of the chef to fight the range. Up to the time we made the change of ranges the service in the kitchen was satisfactory. Mr. Koll was perfectly satisfactory to me until after the introduction of this range." Mr. Morse's testimony upon this subject was substantially identical. Considering the character of this testimony, strengthened by the legitimate deduction that there was evidently general trouble in the kitchen, with the

history of what transpired at the time of the alleged discharge, and the jury might easily have found that Koll's services as cook had been entirely satisfactory, and that the only trouble in the world was with the employees generally because of the change in the implements furnished. The jury would have a right to conclude from the fact that there had been no attempt to end the employment prior to the time of the discharge, that there was in fact no dissatisfaction with the services which Koll rendered as a chef in the hotel. This question was submitted to the jury under an instruction which said: "If you believe from the evidence that the defendants discharged the plaintiff because they were really dissatisfied with his services in the line of his employment, then you must find for the defendants, and it is not necessary that the defendants should have any cause for such dissatisfaction." No charge on the subject, if one thus expressing the law were ever admissible, would have more fairly left to the determination of the jury the question of dissatisfaction. The evidence of dissatisfaction was extremely meager, uncertain, not clearly expressed, and not satisfactorily or definitely established. It was controverted by proof of the defendant's declarations on the subject, of the circumstances of the transaction, by the natural and legal presumption springing from the absence of any attempt to exercise the right of discharge. The court by a most eminently fair instruction, more favorable to the defendants than the case entitled them to, left it to the jury to find the fact on this subject. The verdict was against the defendants and we are without right to interfere with that finding.

Whatever weight may be given to this position, or however little force there may be in these suggestions, the appellants are not entitled to have the case reversed because the judgment is not supported by the law. I cannot admit that the contract is susceptible of the construction which the court puts on it, nor do I believe that the law governing contracts of this description is accurately stated. The opinion states two rules which are frequently invoked by the courts

as guides in the construction of contracts. They are to be interpreted according to the ordinary and usual signification of the words which they have used, due regard being had to the evident intention of the parties. Everybody must concede these general principles, but wide differences may occur when it comes to the matter of their application. Nothing seems to me clearer than that there has been a misapprehension, and a misapplication of the rules in the present case. To ascertain the true significance of a contract courts may not, as critics and philologists, look alone to the words of it. They are of deep significance, but the work of interpretation follows always that of criticism. Its true end is to find out the intent of the instrument, the sense of the words if they are ambiguous, and learn the purpose when the words express it obscurely. The rule of interpretation known as the rational, is as firmly fixed in the law, as the one more commonly invoked—the literal. As Rutherford puts it in his Lectures, page 104, “Where words do not express the intention perfectly, but either exceed or fall short of it, so that we are to collect it from probable or rational conjectures, this is rational interpretation.” In the endeavor to learn what this contract is, and what force shall be given to that word “satisfactory,” we must inquire whether it is so used in the contract, and was inserted under such circumstances that it evidently expresses the intention of the parties, and is to be taken according to its literal meaning. The line which we are called upon to run must be fixed by setting our intellectual pegs as a surveyor drives his stakes, and we must proceed from point to point until the end is arrived at. According to the rules of rational interpretation, words are to be taken according to their ordinary sense, unless it be manifest that when they are thus used they are given a broader meaning than will accord with the intention of the parties, and may therefore under well settled rules be restricted in their signification. Potter’s *Dwarris on Statutes*, pp. 194–196, 197.

There is another thoroughly well established principle of construction by which that compelling the courts to take

words in their ordinary meaning is limited and modified, which is, that every contract must be so construed as that all parts of it will stand; for the law leads to the enforcement of every part, rather than the destruction of any, *ut res magis valeat quam pereat*. These recognized rules of interpretation greatly simplify the difficulty of settling the true meaning of the present agreement.

It consists of two parts: first, there is the engagement of the employers; second, there is the correlative expressed obligation of the employee. It must be observed and borne in mind, that the contract by Bush & Morse is not on condition, not with a proviso, not subject, otherwise than as the law makes it, to the promise of the employee. This distinction is of very great importance when it comes to the consideration of the authorities cited in the principal opinion. Bush & Morse hired Koll for one year at \$130 per month. That was their contract. There is no room for construction to ascertain what their term was, since they definitely entered into an agreement to employ Koll for one year at a fixed wage. Under the rule invoked by the majority, that a contract is to be construed according to its terms, manifestly that part of the engagement is definite and certain. It contains no condition, it is without a proviso except what may be contained in the promise of the employee. This presents the only question of the slightest difficulty. Koll agreed on his part to enter the service, to devote his entire time thereto, and to render good and satisfactory service during the time. Here then are two engagements on the part of two different persons, employers and employee, to do certain things. One of hiring for a year for a wage, the other an agreement to perform the service for which he is hired, for the term, and in a certain fashion. The contracting parties chose possibly an unfortunate word to express their intentions, but it seems comparatively easy to arrive at their intention when the circumstances and whole paper are considered. If the engagement had been to devote his entire time, and give his best endeavors to the faithful performance

of his duties as chef, none could have imagined that he had undertaken to do anything except that which the law would imply from the acceptance of the employment. Evidently this was what the parties contemplated. If such is their manifest intention, the word "satisfactory" must be taken to possess simply this meaning, to wit, that Koll shall faithfully perform, according to his best ability, the services which he was hired to render. If he thus performs them, in the law it must be said that those services are satisfactory, and that the employers are without right to complain. The trouble with the principal opinion is, that they give to the word "satisfactory" a force beyond that even of its ordinary signification. It is made operative to destroy the promise made by the employers, since if it be held that the employee's promise made in this form confers upon the hirers the right to discharge at will, it utterly destroys the year's engagement into which they antecedently entered. In violation of the maxim *ut res*, etc., we have used one term of the agreement and one promise to destroy the prior term. This can never be done. Wherever clauses contain words that are contradictory, and they admit of two senses "the court will adopt that construction which will best carry the just and reasonable intention into effect." It seems to be very clear that there can be no legitimate construction of this contract, which will transform the expressed yearly hiring of the servant into a hiring at will, which will give to the employers the right to discharge without an allegation of the existence of a legal cause which must be established by competent proof. It brings the contract into too close an analogy with Lord Bacon's description of Henry VII laws a "*nemo scit*," to hold otherwise would make contracts but traps for the unwary, and subject them to the uncertainties which prevailed, when according to the same philosopher, the magistrate was able to produce a manuscript decision of an unreported case, and say "Lo! I have the law in my side pocket!" 2 Coke's Institutes, 533.

According to the law as it is written, the position of the

court seems not to be sustained by the authorities. All the cases which are cited are either cases of hiring for an uncertain term and at the evident will of the employers, or else they are agreements to make sundry and divers things to the satisfaction of the persons for whom they are to be constructed. All the cases cited will be found to embrace matters purely of taste, and involve distinctively a selection according to the vendee's conception of what such things ought to be. They relate to busts, clothes, and cases of that description, and, so far as I can find in the books, there are no other cases announcing a similar rule save those where work is to be done to the satisfaction of a body which is clothed with a discretionary and *quasi* judicial power to determine the character of what had been performed. Wherever the contract is one of hiring, or where it includes the production of machinery, or the sale of goods manufactured, or to be manufactured, the rule is a totally different one. With respect to contracts concerning such matters, well considered cases, based upon sound reason and logic, suited to the circumstances of the parties and their evident intention, have held that contracts may not be so construed as to give either party the right at his whim and caprice to reject that which he has contracted to purchase, or to refuse to pay the price of what has been supplied, under the agreement that he shall be satisfied therewith.

In cases of this sort the true rule is "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." *Duplex Safety Boiler Co. v. Garden et al.*, 101 N. Y. 387; *Clark v. Rice*, 46 Mich. 308; *Daggett & Graves v. Johnson*, 49 Vt. 345; *Roy v. Goings*, 96 Ill. 361; *Braunstein v. Insurance Co.*, 1 East & Smith, 783, (101 E. C. L. 782.)

In the latter case proof of loss claimed to be within the insurance was to be made satisfactory to the directors, and the question was, whether they could arbitrarily reject what had been furnished if it was ample according to the contract of the parties to establish that which they were called upon

to prove. The court held that the clause must receive a reasonable construction, and that it would only bind the parties to produce such evidence as the directors might reasonably require. As one of the judges well put it "the putting such a construction on a stipulation like this is opposed to the general rule, that when it is agreed that an act is to be done to the satisfaction of a party it must be understood to mean reasonably to his satisfaction." Other judges put the decision upon somewhat similar *bases*, and held that the parties would have a right to insert whatever condition precedent they chose, but said if the condition is destructive of any right conferred by the contract, it must appear to have been so intended by the parties. Viewed in the light of these principles and these authorities, there seems to me to be but little ground for the construction which the court puts upon this agreement. I am unable to concur in any such conclusion. According to my views of the law, the appellants have maintained no error which entitles them to a reversal of the cause, and it should be affirmed.

Reversed.

WEBBER, APPELLANT, v. PETTY, APPELLEE.

OCCUPANTS—TOWN SITES.

The defendant's occupancy of a lot in a town, the site of which had been entered by the county judge under the provisions of sec. 2387, U. S. R. S., having been prior to that of the plaintiff or his grantor, and it not appearing that he had abandoned his claim, *held*, that, as between the parties, his was the better right.

Appeal from the District Court of Pitkin County.

THIS action was commenced by Henry Webber against William H. Petty, to determine the right to a title to a lot in the town of Aspen, the site of which had been entered by

2	63
2	270

the county judge under the provisions of sec. 2387 U. S. R. S., in trust for the use and benefit of the occupants thereof. The defendant recovered judgment, and the plaintiff appealed.

Mr. T. C. McDEVITT, for appellant.

No appearance for appellee.

REED, J., delivered the opinion of the court.

This suit was brought by appellant to determine the right to a title to a lot in Aspen. Both parties filed their respective claims to the property with M. G. Miller, county judge; appellant on the 23d day of August, 1887, and appellee on the 11th of the same month. Appellant asked in the complaint that he be declared the owner, and that the claim filed by defendant be declared a cloud upon his title, and be removed. A trial was had to the court without a jury. The court found for the defendant, decreeing him to be the owner and entitled to a deed from the county judge. The preliminary questions involved were presented and determined in *Mayor v. Land Co.*, 10 Colo. 191, and in *Wheeler v. Wade*, 1 Colo. Ct. App. 66. It is shown by the evidence that appellee entered into the possession of the lot in May, 1880, and erected a log cabin, the only improvement shown to have been made to the time of the trial, and that on one or two occasions appellee had temporary actual possession; that he remained in Aspen until October of the same year, when he left, and subsequently only visited the place occasionally,—incidentally,—exercised no personal control, and had no personal possession. In the course of time it appears the roof and door were removed from the cabin. In July and August, 1883, one George W. Pearson, who testified that he had known the property and appellee, and of his claim to the property and ownership of the cabin since the spring of 1880, took possession of the property, replaced the roof and door, and used it as a stable for horses; that while so in possession

he saw appellee at Leadville, who spoke of the property, and of being the owner, expressing a wish to sell it, and authorizing Pearson to sell for him if he got an opportunity. It appears that Pearson neither asserted title in himself nor denied the title of appellee at that time. It is also shown that on May 13, 1884, Pearson sold the property, not as that of appellee, but as his own, and executed a quitclaim deed; that the title so attempted to be conveyed passed by mesne conveyances to appellant; that it was the only title he had, except a claim by payment of taxes. It is very doubtful if either showed such compliance with law as to be entitled to enter, but, the controversy having been confined to the two parties, and the right of one or the other conceded, the only question was, which had the better right? The right of Pearson could only be predicated upon abandonment by the former claimant. It is assigned for error and urged that the court erred in not finding the question or issue of abandonment in favor of appellant. The issue does not appear to have been relied upon at the trial, but it may have been; certainly no sufficient or competent evidence was introduced to establish the fact of abandonment. The judgment and decree of the court should be affirmed. Appellee may have been derelict in duty, careless, and have failed to comply with the law, but he was first in point of time, and had had, for two or three years, right and possession that was known and recognized by the grantor of appellant, while the origin of the supposed right of Pearson was not such as to commend it to the favorable consideration of courts.

Affirmed.

GOARD, PLAINTIFF IN ERROR, v. GUNN, INTERVENOR,
DEFENDANT IN ERROR.

SALE OF CHATTELS WITHOUT CHANGE OF POSSESSION, VOID.

The intervenor was a purchaser of the goods attached, but the sale was not followed by an open, notorious and unequivocal change of possession; *held*, that as against the creditor of the vendor, the title of the intervenor could not be sustained.

Error to the County Court of Chaffee County.

Mr. HENRY J. SWAN, for plaintiff in error.

No appearance for defendant in error.

REED, J. It appears that one Arthur Gunn bought out the saloon of plaintiff in error in the town of Salida, paying a part, and leaving the sum of \$120 unpaid. Suit was brought to collect the amount. An attachment issued and levied upon the goods, stock and fixtures of the saloon as the property of Arthur Gunn. E. M. Gunn intervened, claiming to be the owner. A trial was had before a justice of the peace and a jury—verdict and judgment sustaining the attachment; an appeal taken to the county court, trial to the judge without a jury, and finding for the intervenor. The correctness of such finding is the only question to be determined.

The judgment must be reversed. The whole transaction, and all the facts as established by the evidence of both parties, show collusion, and after the alleged purchase of E. M. Gunn, a mixed condition of affairs, very suggestive at least of want of *bona fides*, and presence of fraud. Prior to the pretended sale Arthur was acting as proprietor and his brother, E. M., as barkeeper. After the pretended sale it was claimed E. M. was proprietor and Arthur the barkeeper.

E. M. Gunn testified: "I took charge of the saloon on

March 10, 1889. We had a bill of sale drawn and signed, which was delivered to me on March 22d."

Arthur Gunn testified: "I bought of Goard about the 12th day of February, 1889. I gave Goard my note for \$120, due the first of May as part pay for the saloon. I sold out to my brother, E. M. Gunn, on the 10th of March, 1889. I gave him a bill of sale." Neither party testifies to any consideration having passed or that any was to be paid.

It is shown by all the evidence in the case that no change was made, and that there was no observable evidence of change of ownership; that persons doing business with them and frequenters of the place had no knowledge of any change of proprietors. It will be observed too that the pretended sale followed very rapidly on the heels of the purchase from Goard—hardly a month had elapsed. This is not conclusive of fraud, but a circumstance to be considered in connection with other facts. There was no such open, notorious and unequivocal change of possession as required by law to sustain the title of E. M. Gunn.

Authorities upon this well established and recognized rule of law seem unnecessary. They are abundant in our own court. See *Bassinger v. Spangler*, 9 Colo. 175; *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 526; *Baur v. Beall*, 14 Colo. 383.

The court erred in finding for the appellee (intervenor). The judgment must be reversed and cause remanded.

Reversed.

WEBER, APPELLANT, v. THE DIEBOLD SAFE & LOCK
COMPANY, APPELLEE.

1. SECRET LIENS.

A contract providing for a secret lien may be good as between the parties, but is void as against creditors.

2. CONTRACT OF SALE.—RESERVATION OF TITLE.

A provision in a contract of sale that the vendor shall retain the title to the chattels sold until payment of the price is, as against creditors of the vendee, void, when he is invested with possession of the thing sold and the indicia of ownership. Such secret liens are constructively fraudulent as against creditors of the purchaser.

Appeal from the District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion of the court.

Messrs. LONG & JOHNSON, for the appellant.

Mr. J. A. BENTLEY, for the appellee.

REED, J., delivered the opinion of the court.

Appellee sold a safe to one A. M. Wood for \$375, \$75 to have been paid upon delivery, the balance in deferred payments from time to time, for which Wood made his notes. A written contract was made whereby the title, until full payment, was to remain in appellee, and providing that if the safe should be sold or removed from the possession of Wood without the consent of appellee, it or its agents might take possession of it without legal process, etc. The first payment of \$75 was waived for an indefinite time, the notes taken as agreed, the safe marked with the name of Wood, and delivered. No record was made of the agreement, and as far as shown, was unknown to all except the contracting parties. A short time after the purchase, an attachment was sued out against Wood and levied by the appellant (sher-

iff of the county) upon the safe ; judgment was obtained and the safe sold in satisfaction. An action of replevin was brought by appellee. A trial had to the court resulting in a judgment for appellee for \$380.

The judgment cannot be sustained. The secret contract, as between the parties, was good, but was void as to creditors. Appellee had invested Wood with the possession and all indicia of ownership. It was not a bailment, but a sale subject to defeasance upon a subsequent condition, an arrangement only known to the parties themselves. A party who, by his own acts, places another in the ostensible position of owner, should be estopped to deny such ownership. Private transactions of this character are not favored, and are opposed to public policy.

The case of *George v. Tufts*, 5 Colo. 162, appears to be conclusive of this case. It is there said, "Secret liens, which treat the vendor of personal property who has delivered possession of it to the purchaser as the owner until the payment of the purchase money, cannot be maintained. They are constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession." Under statutes of the state of Illinois very similar in character, it has been frequently held that contracts of this character were void against creditors: *Jennings v. Gray*, 13 Ill. 610; *Ketchum v. Watson*, 24 Ill. 591; *McCormick v. Hadden*, 37 Ill. 370; *Murch v. Wright*, 46 Ill. 487.

The property being in the possession of Wood as owner, it was, under the authorities, subject to the debts of Wood.

The judgment must be reversed and cause remanded.

Reversed.

PHILLIPS, PLAINTIFF IN ERROR, v. RHODES ET AL.,
DEFENDANTS IN ERROR.

1. CONSIDERATION—LOVE AND AFFECTION.

When the parties to a conveyance of real estate are husband and wife, love and affection may be a sufficient consideration between the parties, but it is not a good consideration, nor does the deed pass title when such result would be in fraud of existing creditors.

2. EVIDENCE—WHAT IS NOT.

The mere fact that the property was purchased at execution sale by the creditors for less than its estimated value, is not evidence of a conspiracy to deprive the plaintiff of her rights therein.

3. ATTORNEY AND CLIENT.

A client cannot maintain an action against her attorneys for alleged fraud in securing a compromise of a disputed claim, when it appears that but for the close attention of her counsel she would have received nothing, and that she agreed to the settlement after consultation with her father, even though she was a minor at the time.

Error to the District Court of Arapahoe County.

Mr. L. WALKER, for plaintiff in error.

Messrs. MARSH, VOORHEES & MARSH, Mr. H. E. LUTHE and Mr. W. W. COOKE, for defendants in error.

This was a suit in equity brought by plaintiff against L. R. Rhodes, George A. Corbin, James Guard, Ernest Bauman, W. V. Cook and Lizzie A. Cook to recover certain city lots and buildings upon them, and to have sundry conveyances canceled. Plaintiff in September, 1884, at about the age of fourteen years married the defendant, Ernest Bauman. At the time of such marriage Bauman was indebted to certain individuals, among whom was one Alexander V. Sherrer, the defendant, James Guard, and his partner, Albert A. Kneeland, as Guard & Kneeland. Plaintiff at the time of her marriage had no individual property, and came into the possession of none while living with Bauman as his wife.

In February, 1885, Bauman, with his own money bought the property in controversy and had the conveyance made to plaintiff. In November, 1885, Bauman required and induced plaintiff to convey the property to his mother, Marie C. Bauman. No consideration passed save \$2, which was immediately returned. In June, 1885, Marie C. Bauman, without consideration, conveyed the property to plaintiff's husband, Ernest Bauman, and in August, 1887, Ernest Bauman, without consideration, conveyed the property to his brother, Gustave Bauman.

In March, 1885, Guard and Kneeland commenced suit against Ernest Bauman to collect the amount of money due to them, and shortly after obtained judgment for the sum of \$883.72 and costs. In July, 1886, Alexander V. Sherrer instituted suit, and in September following obtained judgment for \$583 and costs. Upon both judgments executions were issued which were levied upon the property in controversy. Upon sale under such executions the right, title and interest of Ernest Bauman in the property was sold and purchased by James Guard and Sherrer. Subsequently the sale under execution was vacated and the decree amended requiring Ernest Bauman to pay the amount of such judgments within ninety days, and in default of payment, property to be sold in satisfaction of the judgments. Default was made by Ernest Bauman in payment, and some time during the year 1886 (date not given) the property was again sold and again purchased by Guard and Sherrer.

Some time prior to October, 1888 (date not given) plaintiff instituted proceedings for divorce against her husband, Ernest Bauman; at such date the suit was still pending and undetermined. The defendants, Rhodes and Corbin were partners, or together interested in the practice of law as attorneys. Plaintiff applied to defendant, Rhodes, to employ him to assist one McCord, her former attorney, in the prosecution of the suit for divorce, and to assert whatever rights she might have to the property, and Rhodes accepted such employment. Subsequently plaintiff succeeded in her suit for

divorce and the decree was entered. It appears that such litigation and adjudication did not embrace the property rights of plaintiff; no alimony granted, and the rights, if any, of plaintiff were left to be determined by a subsequent suit to enforce her supposed rights against the property. The plaintiff being at the time of her marriage a minor of about fourteen years of age, arrived at her majority about the time or shortly subsequent to the decree of divorce, consequently, all the proceedings narrated occurred during her minority, between the date of her marriage and attaining her majority.

The defendant, Rhodes, deeming it necessary to disavow the acts of the plaintiff during her minority, including the conveyance by her made to her mother-in-law, Marie C. Bauman, required her to reconvey the property, suggesting defendant, Corbin, as the proper person to whom the conveyance should be made. She, acting upon such counsel or requirement, made conveyance of the entire property in controversy to the defendant, Corbin, such conveyance having been made without consideration and solely, as shown, for the purposes of disavowal.

It is alleged that at that time the property in controversy was worth between \$12,000 and \$14,000. The legal title, by former conveyances, was vested in Gustave Bauman as before stated. The statutory time for redemption from the sales under execution against Ernest Bauman had not expired. The amount necessary to redeem from such sales was between \$3,000 and \$4,000.

Plaintiff by herself and her father (*guardian ad litem*) attempted to raise the money necessary to redeem from the sales under the execution, but failed.

The defendant, W. W. Cook, was the attorney of James Guard, who held whatever title was conveyed by virtue of execution sales, and was entitled to the amount of money paid if the property was redeemed. While matters were in this condition Guard became willing and desirous of perfecting his title to the property by compromise and the purchase of the supposed outstanding equities of plaintiff, Ernest

Bauman and Gustave Bauman, and through his attorney and agents entered into negotiations with the parties respectively.

Plaintiff was informed by Rhodes, her counsel, that he could obtain for her about \$2,000 by settlement; advised that she accept. The amount was afterwards increased to \$2,250, from which the counsel fee of Rhodes and Corbin amounting to \$500 was to be paid, leaving plaintiff the sum of \$1,750. After consultation with her father it was concluded to accept the proposition.

The defendant, Corbin, conveyed or quitclaimed to James Guard whatever title or interest he had in the property by virtue of the conveyance to him from the plaintiff. About the same time Gustave Bauman and Ernest Bauman conveyed and quitclaimed their supposed interests to Guard. Including the purchase price of the property under the execution, after purchase of the supposed interest as above stated, the property represented a cost to Guard of about \$7,000.

Lizzie A. Cook, defendant, was the wife of W. W. Cook. At some indefinite time during the proceedings narrated, she became the purchaser of two of the lots in controversy. Subsequent to all these proceedings, plaintiff being dissatisfied with results, instituted this suit to recover the entire property or its value, making all the parties named defendants, alleging that defendants, taking unlawful advantage of her minority and want of business knowledge, had entered into a conspiracy to defraud her, acquire the property and distribute its value in some manner among themselves, alleging bad faith and an utter disregard of professional duty in her attorney, Rhodes; also, imputing dishonesty to defendant, Corbin, in furtherance of a preconceived conspiracy and intention to defraud her, and alleging that the conveyance made by Corbin to Guard was without her knowledge or consent and in fraud of her rights. Plaintiff prays that all conveyances heretofore made be deemed to be void and of no effect, and that James Guard and Lizzie A. Cook be compelled by decree to convey to her the property in controversy freed of all

incumbrance, to deliver the possession of the property to her, and account for the use and occupation during the entire time they have been in possession.

Defendants, Rhodes, Corbin, Guard, W. W. and Lizzie A. Cook answered, the first two by separate answers, the last three jointly, denying the allegations of the complaint, denying and disavowing all confederacy and joint action, and setting up the facts as above stated. Replications were filed to the respective answers and an extended trial had, a large mass of testimony introduced. The court found for the defendants and a decree entered to such effect, and that they recover their costs from the plaintiff and have execution for the same.

REED, J., after stating the facts as above, delivered the opinion of the court.

The decree of the district court must be affirmed. The suit should never have been instituted. If instituted upon erroneous information, it should have ended with the decree of the court below. There was an utter failure, by evidence, to establish any fact necessary to entitle plaintiff to the relief asked, or any other relief. As it is, we are compelled to wade through 272 pages of printed abstract, of which 48 are pleadings, and balance an *abstract* (?) of evidence, a large part of which was irrelevant—not calculated to establish any fact in issue or any fact of interest in any way pertaining to the assertion of the supposed rights.

Plaintiff was married before she was fourteen years old—had no money or individual property. Before she was fifteen, her husband, with his own money, purchased the property in controversy and had the conveyance made to his wife. At the time of such purchase he was indebted, owing the debts that were subsequently asserted against the property. Conceding that the relation of husband and wife, and “love and affection,” are a sufficient consideration, *inter parties*; it is not a good consideration, nor does the conveyance carry

title when in fraud of the rights of existing creditors. What plaintiff took, if anything, was the equity remaining after the debts were discharged. In our view of the case, the minority of plaintiff, her conveyance to her mother-in-law, the conveyance by the mother-in-law to the husband, and the husband to the brother, Gustave, may all be disregarded as shifts on the part of the husband to prevent the property's being subjected to the payment of debts. The questions in regard to disagreement, separation, subsequent divorce, alimony, etc., may also be eliminated. The legal result would have been the same had husband and wife continued together in the utmost harmony and earthly felicity—unless the combined efforts of husband, mother-in-law and brother-in-law could have been sufficient to defeat the collection of debts—whether individual force, wasted in different directions, prevented its accomplishment, we cannot determine. This eliminates from the discussion all acts and conduct of the plaintiff before attaining her majority, and brings us to her conveyance to Corbin. It was a voluntary conveyance without consideration, deemed necessary to be made in her interest. It made Corbin her trustee, nothing more; no undue influence is shown to have been exerted; she was fully informed of the object and intention and all necessary facts, and voluntarily made the conveyance. No evidence is introduced tending to show any conspiracy with others, or any want of good faith in the execution of the trust, or that he made a dollar out of it.

The property having been sold under the executions, plaintiff and her father made an unsuccessful effort to obtain the money to redeem. In order to realize, if possible, something from the property, negotiations were entered into by plaintiff, Gustave and Ernest Bauman, each individually, through their respective agents and counsel, with Guard, to compromise matters, resulting in Guard's buying the supposed rights and interests of the three parties. Gustave and Ernest each received an agreed sum and quitclaimed to Guard. Plaintiff and her father had an interview with their

counsel, Rhodes and Corbin, the offer from Guard of \$2,000 submitted, which was temporarily declined while an effort was made to secure more, which resulted in an offer of \$2,250, which was accepted; \$1,750 paid to and received by plaintiff in full for her claim, and \$500 retained by counsel for services. The interest or claim of plaintiff was conveyed by Corbin, who held the legal title.

It is clear from the evidence that the matter was fully understood and agreed to by the plaintiff. It is equally clear, that had not such result been reached by the close attention of counsel to her interests, nothing would have been obtained.

The whole cost to Guard being something less than the estimated value, defendants are charged with having conspired with each other and having directed their united efforts to defrauding her and acquiring the property for less than value, and the settlement on the part of the plaintiff is ignored. There was no evidence whatever of conspiracy or a concerted action by the others to make her a victim. Each appears to have worked individually to accomplish a purpose, Ernest, and Gustave Bauman and plaintiff being successful.

The decree should be sustained.

Affirmed.

WHITEHEAD, APPELLANT, v. JESSUP, APPELLEE.

1. ACTION FOR MALICIOUS PROSECUTION—WHAT MUST CONCUR.

The concurrence of malice and want of probable cause is essential to a right of action for a malicious prosecution.

2. MALICE MAY BE INFERRED, WHEN.

Where there is sufficient evidence of want of probable cause justifying the prosecution of the criminal proceeding, malice may be inferred by the jury.

3. ADVICE OF COUNSEL, WHEN A DEFENSE.

That in the prosecution of the criminal cases, the complaining witness acted under the advice of counsel, obtained and used in good faith, after a full and fair statement of all the facts bearing on the guilt

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or innocence of the accused of which knowledge might have been obtained by the exercise of reasonable diligence, is a defense to an action against him for malicious prosecution. But it is indispensable that the statement to counsel shall have been full and fair.

4. EVIDENCE.

In an action upon a written instrument, testimony as to conversations and negotiations which preceded and led up to the contract, must be excluded, upon the principle that all such antecedent matters are merged in the writing or disposed of by it, but this rule is not applicable when the issue is as to the existence of probable cause justifying criminal proceedings.

Appeal from the Superior Court of the City of Denver.

ACTION for damages sustained by the plaintiff by reason of a criminal prosecution instituted against him by the defendant. The plaintiff recovered judgment, and the defendant appealed. The facts are fully stated by BISSELL, J.

Sometime in 1888 Andrew Whitehead filed a complaint before Sales, a justice of the peace in Arapahoe county, charging Alvin L. Jessup with the crime of obtaining money by false pretenses. Jessup was arrested on a warrant issued under the complaint, examined and discharged. This action was brought by him against Whitehead to recover the damages which he claimed to have sustained by reason of this criminal prosecution. No statement of fact is necessary to an understanding of this controversy other than a narration of what Whitehead claimed were the fraudulent representations made to him by Jessup. Early in 1888 three parties, Appleman, Griswold and Jessup, were jointly and equally interested in an insurance agency which had been incorporated. Jessup had purchased his interest from Griswold and had given therefor his promissory note for \$3,000, which was subject to certain credits derived from the profits of the business, and a reduction because of certain conditions under which the sale had been made. Jessup desired to dispose of his interest, and Whitehead and one Herzinger entered into negotiations to buy it. It would appear that they contemplated purchasing the entire agency, but this is unimportant.

At the time of these negotiations Jessup's note to Griswold for \$1,500 secured by the pledge of his stock as collateral was outstanding. Griswold was indebted to one Holland for \$300 and had pledged this note of Jessup with its collateral with Holland to secure the payment of his note. In some way, which it is not necessary to consider, but subsequent to the maturity both of Griswold's and of Jessup's paper, Appleman purchased from Holland this Griswold note, and received the collaterals which had been delivered to Holland as security therefor. During the negotiations which Jessup had with Whitehead and Herzinger he stated that the only claim against his stock was \$372 which he owed to Griswold under the terms of their deal, and the condition of the corporation's books. Whitehead purchased the Jessup interest in the stock and gave him a check for \$375 with which to relieve it from the pledge. In the meantime, as stated, the notes and stock had passed into Appleman's hands, who took the \$372 which Jessup claimed he owed and which he tendered to him, and then declined to surrender the stock, insisting that he had bought it from Holland and owned it. He gave Jessup a receipt for the money which was taken to Whitehead, who thereupon insisted that Jessup had swindled him, because the stock had been pledged on the fifteen hundred dollar note, and was, as he contended, charged with a liability to that extent. Whitehead insisted upon the return of his money, or the delivery of the stock, and, failing to get either, went to the assistant district attorney to institute criminal proceedings against Jessup.

Messrs. MARKHAM & DILLON, and Messrs. ROSS & DEWEESE, for appellant.

Mr. F. A. WILLIAMS, for appellee.

BISSELL, J., delivered the opinion of the court.

No discussion of the law controlling actions for malicious prosecution can prove profitable. It has been settled by a

long series of adjudications which will furnish precedents for all possible phases of such controversies. It is enough to announce the lines within which this judgment must fall. The concurrence of malice and want of probable cause is essential to the right of action. Both are the proper subjects of proof, and neither are matters of presumption, save that where there is suitable and sufficient evidence of a want of probable cause, malice is a legitimate matter of inference with the jury. *Brown v. Willoughby*, 5 Colo. 1; *Stewart v. Sonneborn*, 98 U. S. 187.

Manifestly these matters are within the province of the jury, or of the trial court. Without some unusual manifestation of passion or prejudice, or the presence of findings in the record which warrant the inference that the conclusions were not controlled by a due regard for the law, appellate courts will be very reluctant to disturb the judgment.

It is comparatively easy to state the universal definition of probable cause. It is expressed in *Brown v. Willoughby*, and was re-defined in substantially the same language in *Clement v. Major*, 1 Colo. Ct. Ap. 297.

Like every other controversy of this description this matter rested upon very conflicting testimony. As to whether what had been discovered by Whitehead would lead a man of ordinary caution and prudence to believe Jessup guilty of the crime with which he charged him, or to entertain an honest and strong suspicion of that guilt, is a matter on which there might possibly be honest and marked differences of opinion. It is undoubtedly true that there were many items of information brought to Whitehead's attention prior to the filing of the criminal information which ought to have raised doubts in the mind of a layman, and grave doubts in the mind of a lawyer like Whitehead, whether Jessup was actuated by a criminal intent in any part of the transaction, and like doubts as to whether his purpose was fraudulent when he made the statements which Whitehead insists led him to part with his money. Since the testimony leaves this matter in the region of uncertainty, it might easily be thought

the appearance of the witnesses had a controlling effect upon the mind of the court, and fully justified him in reaching his conclusion that Whitehead was without probable cause. This finding cannot be disturbed. The permissible inference of malice from the want of probable cause is a complete answer to the contention that malice must be established by proofs. It might easily be held that there was proof of facts and circumstances which would justify the trial court in finding that Whitehead was actuated by a malevolent purpose. It is the conclusion of this court that there is no such absence of proof on these two necessary elements of the action as warrants the court in disturbing the judgment.

The objection made to the proof of Justice Dormer's record is not available. But for the admissions contained in the pleading, and the limited objection urged to the introduction of the records at the trial, it is quite true that the receipt of them could not be justified. There was a failure to lay the necessary foundation if an issue had been raised in regard to the matter, and there was clearly a lack of proof to admit their introduction if the requisite objection had been taken. Dormer's official position, and his judicial action in the premises on the proceedings initiated against Jessup, were averred in the complaint, and were not so put in issue as to call for evidence on the subject. When the record was offered the only objection interposed was that it was insufficient and did not show the discharge of the prisoner. Plainly this objection raises no question as to the character, or general admissibility of the record as such.

During the progress of the trial considerable testimony was given as to what occurred between the parties prior to the time of the making of the contract by which their rights and correlative obligations were expressed and determined. It is insisted that the court erred in admitting these conversations, and that the parties were concluded by the terms of their written instrument. As a general rule all conversations and negotiations which precede and lead up to a contract are said to be disposed of by the written instrument

and to be merged in it. For some purposes, and when an action is brought upon the contract, this principle may be invoked, and must be held to exclude such testimony.

In this case, however, the inquiry was as to the existence of probable cause which justified Whitehead in instituting criminal proceedings against Jessup. To determine it, it was needful to go behind the contract, and to ascertain the extent and the limit of the information which he possessed concerning the pledge of Jessup's stock.

The remaining proposition is one of considerable importance, and the only one of difficulty in the case. The principal defense was based on the doctrine, that wherever in criminal prosecutions the plaintiff acts under the advice of counsel, used in good faith, and obtained after a full and fair statement of all the facts bearing on the guilt or innocence of the defendant, which he knew, or by reasonable diligence might have obtained, he has a good defense to an action for malicious prosecution. This rule is conceded. It has been variously stated, and perhaps with other and further limitations than those heretofore expressed. Without intending to enunciate a rule applicable to all cases, the one above expressed may be taken as a fair statement of the law. This leaves the inquiry whether Whitehead fully and fairly stated all the facts within his knowledge, or all which he might and ought to have learned before he instituted criminal proceedings.

Whitehead and Herzinger were jointly interested in the transaction. They jointly prosecuted whatever inquiries they made, and conjointly made application to the assistant district attorney to file the complaint. Herzinger had examined the criminal statutes; and the conclusion is irresistible, that Herzinger and Whitehead had discussed the propriety and feasibility of a resort to those statutes to enforce their claim. That Herzinger was informed of the exact status of the Holland loan, and that he knew that Jessup's stock was collateral on a fifteen hundred dollar note before the complaint was filed, cannot be disputed. Griswold had

evidently told him all about it, and the whole transaction and the purchase had been a matter of very considerable discussion between Whitehead and Herzinger. The only controversy is whether Whitehead had knowledge of the pledge of Jessup's stock on the fifteen hundred dollar note when he parted with his money. There is much evidence to show that he had that knowledge. On the proof this conclusion would be reached. To uphold the judgment it will be assumed that the trial court reached the same conclusion. In any event, if he had not that knowledge, the slightest inquiry would have enabled him to ascertain two facts: That Appleman purchased the Griswold note from Holland, with the other note and stock attached as collateral subsequent to the maturity of both pieces of paper; and second, that there was no basis whatever for Appleman's contention that he had gotten the stock from Holland in such fashion as to give him any title to it, except that growing out of Griswold's rights to the fifteen hundred dollar note. If these things, with what other information he had, had been stated to counsel, it is hardly probable that the attorney would have advised a criminal prosecution. It is certainly true that if he had been told that Whitehead knew that the stock had been pledged as collateral for a fifteen hundred dollar note before he went into the transaction, he would not have advised that a false pretense could be predicated on a deceit practiced by concealment of the extent of the pledge. Whitehead was evidently advised of the nature and character of the transaction between Griswold and Jessup, and was charged with information which would lead an ordinarily prudent business man to conclude that he was buying stock which was not in Jessup's possession, and subject to the assertion of a claim by a pledgee about which he was bound to inquire unless he was willing to take chances on the purchase. At all events it is the conclusion of this court that there was no such fair and full statement to counsel as is indispensable when his advice is to be interposed as a shield to a recovery in this sort of an action.

Our conclusions are in entire harmony with those of the trial court on this proposition.

No other error assigned is of sufficient importance to justify a discussion, and there is none apparent in the record sufficiently well grounded to warrant a reversal of the judgment, which will therefore be affirmed.

Affirmed.

HAGERMAN ET AL., APPELLANTS, v. MOORE, APPELLEE.

1. APPEAL—NONE FROM INTERLOCUTORY JUDGMENT.

An interlocutory judgment is not appealable.

2. JUDGMENT—WHEN INTERLOCUTORY.

An order or judgment which does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, is interlocutory and not final. To be final it must conclude the particular suit in which it is entered.

3. APPEAL DOES NOT LIE, WHEN.

The cause remaining undetermined in the court below as to the appellee's codefendants, there could be no final judgment with respect to him which would permit an appeal by the unsuccessful party prior to the determination of the entire suit. There can be but one judgment in an action from which an appeal may be taken.

4. APPEAL MAY BE DISMISSED WITHOUT PREJUDICE.

Since this appeal cannot be entertained it is dismissed, but without prejudice to the rights of the parties to raise the questions attempted to be presented by this record, should an appeal be hereafter taken from the final judgment in the case.

Appeal from the District Court of Pitkin County.

ON the 5th of August, 1884, a suit was commenced against Moore, Bracken and Daniel, by divers parties who claimed an interest in the subject-matter of the controversy stated in the complaint. The present appellants succeeded to the interest of the then plaintiffs in the suit, and the litigation is proceeding in their name. The abstract does not contain the complaint, but to make the case intelligible in some particu-

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lars, reference was made to the one in the transcript. The suit was brought on a contract alleged to have been made *inter partes*, Moore, Bracken and Daniel of the one side, and the plaintiffs of the other, whereby, according to the agreement set out, Moore and his co-owners of the Bonnybel claim, were to procure a patent on that property, and subsequently deed to the others, as claimants and owners of the Little Giant claim, a portion of the territory which would be embraced in the patent. It was averred the plaintiffs carried out their agreement, that the defendants got their title from the government, and then refused to convey. A specific performance of this alleged contract was the purpose of the bill. Bracken and Daniel were soon served with a summons and appeared in the cause. Moore was not served, and on the 17th of July, 1885, he voluntarily came into court and made a motion, specially appearing for the purpose, to dismiss the cause for want of prosecution. This motion was denied. In November, 1887, he again appeared in the same manner and filed a similar motion. This motion was, in November, 1888, a year later, sustained, and the court entered a general order that the cause be dismissed, and adjudged that the defendants recover their costs, etc. This order of dismissal, however, was accompanied by a reservation of leave to the plaintiffs to move to reinstate the cause. In January, 1889, pursuant to the leave thus reserved, the present plaintiffs came in as successors in interest and moved to reinstate the cause. The cause was reinstated on the 8th of January, 1889. On the 15th of the same month, Moore entered another motion to dismiss for want of prosecution. The action of the court under this motion was a little unstable. The first order sustained the motion; the next order set the one dismissing the cause as to Moore aside, and Moore excepted to the ruling. The next day, January 16, the motion was renewed, heard and argued, and taken under advisement. On the 21st of January, the following order was entered: "On this day it is ordered by the court, that the motion heretofore taken under advisement dismissing this

cause as to Charles J. Moore be, and the same is hereby sustained." The next day the plaintiff's attorneys prayed an appeal to the supreme court, which was allowed, bond fixed, and thereunder this cause came to the supreme court, whence, under the statute, it was transferred to the court of appeals for determination. No other order was entered, and there is nothing in the form of a judgment, either in the printed abstract, or in the transcript of the record.

Messrs. ROGERS & CUTHBERT and Messrs. WILSON & STIMSON, for appellants.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court.

Clearly the only action which can be taken by the court with reference to this case is to dismiss the appeal. It is difficult to understand why the case was brought here, or why it has been allowed to remain on the docket to the present time. It has been repeatedly adjudicated that under the act regulating appeals to the supreme court a final judgment must be entered before there is any right to a review of the proceedings below. This judgment must be a final determination of the controversy between the parties. What comes within this definition is clearly expressed in the decisions on the subject. As was said in *Dusing v. Nelson*, 7 Colo. 134, "if the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final. To be final it must end the particular suit in which it is entered." Formalities are not essential to a valid judgment entry, but if the forms usually adopted are not resorted to, there must be some equivalent expression which will indicate that the matter in controversy has been determined, and the entry must appear to be intended as the entry of a judgment. *Higgins v. Brown et al.*,

6 Colo. 148; *Alvord et al. v. McGaughey*, 5 Colo. 244; *Stevens v. The Solid Muldoon Printing Co.*, 7 Colo. 86.

The order entered in this case neither in form, nor in substance, approaches the definition of a final judgment as expressed by these authorities. It was an order entered on a motion, and neither adjudged the successful party his costs, nor permitted him to depart from the court without day. Under these circumstances, if this were the only question to be considered, it would be decisive of the present appeal.

It is equally clear that under the general rule which requires the entry of a final judgment before a review can be had in an appellate tribunal, the parties are not entitled to a hearing in this court. The action was brought upon a contract against three persons; it was dismissed as to only one of the defendants against whom rights were claimed. So far as can be determined from the record the cause is still pending against Moore's codefendants in the district court of Pitkin county, and may possibly before this time have proceeded to final judgment. Whether this be, or be not true, when judgment is entered in that case an appeal will undoubtedly lie, and there will thus be presented this anomalous condition of affairs: there will be two appeals taken in the same suit to review two different judgments entered in the same action. This is not consistent with the law regulating appellate proceedings. There can be but one judgment in an action from which an appeal will lie. An appeal therefrom will bring up for review all matters occurring during the progress of the litigation, and afford an opportunity to correct whatever errors may have been committed during the progress of the trial. *Harrison et al., v. Farnsworth*, 1 Heisk. 752; *De Lap et al. v. Hunter et al.* 1 Sneed, 101; Freeman on Judgments, sec. 28.

Since the cause remained undetermined as to Bracken and Daniel, there could be no final judgment with respect to Moore which would permit an appeal by the unsuccessful party prior to the determination of the entire suit. There is no statute in this state permitting it, and the appeal could

neither be properly taken, nor prosecuted to a determination of the question presented by the dismissal of the action as to Moore.

Since the appeal does not lie it will be dismissed, but this judgment will not be taken to conclude the right of the parties to raise the particular question presented in this record, should any appeal be hereafter taken from a final judgment in the case.

Appeal dismissed.

THE DENVER, TEXAS & FORT WORTH RAILROAD COMPANY,
APPELLANT, v. RICHARDS, APPELLEE.

VERDICT UPON CONFLICTING EVIDENCE.

The court will not interfere with the verdict when it appears that it was rendered upon conflicting testimony, and it does not appear that the evidence was not fairly considered by the jury.

Appeal from the District Court of Las Animas County.

Messrs. WELLS, MCNEAL & TAYLOR, for appellant.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court.

In March, 1888, the railroad company constructed its line along Elm street in the city of Trinidad, in front of the premises owned and occupied by the appellee Richards. Within a few months of that time Richards brought this action against the railroad company to recover the damages resulting from the building and operation of the road. On the trial a good deal of evidence was introduced by both sides in support of their respective contentions. The jury rendered a verdict against the company for \$300, to which exception was taken, and the case was brought to the supreme court by appeal and subsequently transferred to this tribunal.

Two propositions only are urged and discussed as errors by the appellant. The company contends that the stipulation concerning the ownership of the property, which was the only evidence on that matter submitted to the jury, did not sustain the allegation that the plaintiff was the owner of the property at the time the road was constructed and the damages accrued. There is very little force in this position. The stipulation is "that the plaintiff is the owner of the property as stated in the complaint." That pleading avers that at the dates stated therein Richards was the owner in fee, and in possession of the premises; it alleges the time the road was built; the period of its operation, and when the damage was done of which the plaintiff complained. In the absence of any testimony which tended to controvert the concession of the stipulation, it must be held that the proof as to ownership is sufficient to sustain the verdict and judgment.

The other point relied on is, that the damages were excessive. The testimony offered on this subject, as is true in most all cases of this description, placed the injuries at all points from nothing to \$1,500. The jury viewed the premises, and for themselves could judge what harm had been received by the owner of the property. It is not so evident from the testimony in the case that the jury did not fairly consider and impartially determine the question of damages as to call for the interference of this court. It may be conceded, according to the argument of counsel, that there is a very strong prejudice always present in the jury box whenever actions of this description against a railroad company are submitted to them for determination. Even though this might be true, the proposition is not one which will justify action by the court. If juries do not form ideal tribunals for the settlement of such controversies, the remedy is with the body of the law makers, of which the judiciary form no constituent part.

There is no suggestion of error which either calls for extended analysis, or would justify the disturbance of this judgment, and it will accordingly be affirmed.

Affirmed.

THE COLORADO SOAP COMPANY, PLAINTIFF IN ERROR, v.
BURNS, DEFENDANT IN ERROR.

SALE—CONSIGNMENT.

D., having bought a quantity of soap of the plaintiff, was induced to take on consignment one hundred and fifty additional cases, to be accounted for at the rate of \$3.25 per case, if he succeeded in selling it, and he agreed that plaintiff might draw for the amount of the soap account at ninety days,—the draft to be accepted for plaintiff's accommodation, but at maturity should be paid only to the extent of sales by D., from the one hundred and fifty cases. None of the soap consigned to D. was sold by him, and the draft was returned unpaid. The one hundred and fifty cases of soap were never commingled with D.'s general stock. *Held*, that the title to the soap remained in the plaintiff as against attaching creditors of D.

Error to the District Court of Las Animas County.

Mr. T. J. O'DONNELL, for plaintiff in error.

Messrs. MCCHESNEY & HITT, for defendant in error.

BISSELL, J., delivered the opinion of the court.

In 1889, the Colorado Soap Company was a corporation manufacturing soap in the city of Denver. In the early part of that year Cook & Davis were grocers doing business in the town of Trinidad. Subsequently there were some changes in the personnel of that firm, and probably whatever interest the firm had in the stock passed to other parties before the transactions which will be stated. The details are unimportant, since the decision will be rested upon no consideration of any of these matters. The whole case turns upon the nature of the transaction between the company and Cook & Davis and the legal consequences which attach to it. The court found that the goods which are the subject of this action were sold by the company to Cook & Davis. It is impossible to treat that finding as one of fact, in any

such sense as to make it absolutely obligatory upon this tribunal. It is thus stated, but it is evidently more a conclusion of law than a determination of what the fact was, since the evidence on the subject is not a matter of controversy. There were no witnesses who testified to the matter except the manager of the company and Davis, and they are in entire harmony as to what occurred. In our judgment, it is a naked legal question whether what was done constituted a sale, or whether the title remained in the company, and Cook & Davis were constituted factors for the purpose of disposing of the goods. Cook & Davis had evidently for some time been customers of the soap company. Early in 1888 they had bought of them some cases of what is known to the trade as "Reverence" soap. At the time of the purchase, Balcom, who was the manager of the company, tried to induce the firm to buy 150 additional cases of the same brand. The original negotiations fell through, but Davis came to Denver, when Balcom renewed his efforts to sell the stock to the firm. Davis refused to buy, but the parties finally came to an agreement about it. It was agreed that the company should ship Davis the 150 cases and he would attempt to sell it. If he succeeded, then he should account to the company to the amount of his sales at the rate of \$3.25 per case. Balcom represented that the company was in close quarters financially, and needed a good deal of money. He wanted to draw for the goods sold, and also for this 150 cases at ninety days, with the understanding that the draft was to be accepted for the accommodation of the company, and on its maturity should be paid as to the goods then purchased, and to the extent of any sales which might then have been made out of this additional lot of goods. Davis agreed to it. The proper entry was made on the books of the company to show the character of the transaction, the draft was drawn and accepted, and on maturity sent through the bank for collection. When it was presented the concern paid it to the amount of their purchases, but declined to pay that part of the draft which represented the 150 cases of soap. The draft

was returned and again sent to Trinidad. It was thereupon endorsed by Davis with a memorandum that the goods were shipped on consignment and nothing had been realized. This explanation was accepted by the company, and nothing further was done about the draft. When the goods came to Trinidad they were not mingled with the general purchases of the firm. Davis, who seems to have succeeded to the co-partnership interests, became subsequently embarrassed, and divers suits were commenced against him by his other creditors. Writs of attachment were issued to aid in the collection of the claims, and these goods were seized by Burns, the sheriff of Las Animas county. The present suit in replevin was commenced against him by The Colorado Soap Company, and he defended, alleging title in Davis. On the trial the foregoing facts appeared, the court found against the company, and adjudged the title to have been in Davis at the time of the service of the writs. This judgment was clearly wrong.

In the absence of equitable considerations, or the intervention of rights which, under other and well recognized rules, are entitled to protection as against one who has put property into the possession of his agent or representative for the purposes of disposition, the law will never affix to a transaction any other character than that which the parties evidently intended to give it. Plainly a sale was not contemplated between the company and Davis. They assumed to each other no such relation as that held by vendor and vendee, and the title to the goods which were put in the possession of Davis cannot be taken to have passed from the company, unless there are other reasons than those growing out of the transaction itself which require that the rights of the attaching creditors shall be protected. *Warner v. Martin*, 11 How. 209; *Burton et al. v. Goodspeed*, 69 Ill. 237; *Loomis et al. v. Barker*, 69 Ill. 360; *Edgerton et al. v. Michels et al.*, 66 Wis. 124.

There are no such considerations in this case. The creditors are without any equitable rights, and have no other

claim to the protection of the court than that which ordinarily results from the seizure of property belonging to a third person. If goods are taken which are not the property of the defendant in the writ, they cannot be held to answer his debts; he must either have title, or from some other sufficient legal reason the goods must be subject to the lien of the creditors. There is in this case an entire absence of any fact which would affect the title of the company, and the goods must be held to be exempt from any liability to seizure for Davis's obligations.

For the error committed by the court in holding as a matter of law upon the evidence that the transaction between the parties constituted a sale, the judgment in this case must be reversed and the cause remanded.

Reversed.

CHILDS ET AL., APPELLANTS, v. LOWENBRUCK, ET AL.,
APPELLEES.

PRACTICE.

In cases where the testimony was taken before a referee and by him certified to the trial court, the appellate court will upon review, examine the evidence and determine for itself the correctness of the findings of fact.

Appeal from the District Court of Huerfano County.

D. McCASKILL, for appellants.

No appearance for appellees.

RICHMOND, P. J., delivered the opinion of the court.

This was a proceeding for the purpose of determining priorities of water rights to water in Water District No. 16, Huerfano county, Colorado. No complaint is interposed as

to the regularity of all the proceedings, but the appellants prosecute this appeal for the purpose of reversing the finding of the court with reference to the priorities of two ditches mentioned in the petition. Who originally petitioned the court in this matter we are unable to determine, for the reason that the transcript, bill of exceptions, nor the printed abstract favors us with a copy of the petition.

The errors assigned are :—That the court erred in not dating the appropriation of the Hicklin Ditch from April 1st, 1867, instead of April 1st, 1872 ; and, that the court erred in allowing the Zan Ditch, so called, any appropriation ; and, that the court erred in dating the appropriation of water by the Whitman & Mott Ditch, so called, on the 31st of August, 1867, instead of 1873.

Other errors are assigned but they are substantially embraced in the above.

The cause was referred to a referee who took the testimony and reported it with his finding to the court. Thereupon exception was made to the finding of the referee and the exception so made was duly argued and submitted. The court thereupon, after reviewing all the testimony, made its final decree adopting largely the report and finding of the referee.

The argument of counsel for appellants is based entirely upon the insufficiency of the testimony to support the finding and judgment.

We have examined the testimony and feel satisfied that the finding and judgment must be affirmed.

It is true that under the rules of the court where the testimony is taken by a referee, the appellate court will review the testimony and judge of the controversy upon its merits. And in keeping with this rule, notwithstanding the fact that the cause is brought here upon a very meager record, we have reviewed the testimony and reached the conclusion that the finding and decree of the court is sufficiently sustained by it.

It would serve no useful purpose for us to recite in detail the testimony upon which this conclusion is based. It is

sufficient for the purposes of this opinion to say that in our judgment, from the record as presented, no error is apparent which would warrant us in disturbing the decree of the court below.

The decree must be affirmed.

Affirmed.

JONES ET AL., APPELLANTS, v. THE MONTROSE MERCANTILE COMPANY, APPELLEE.

NEW TRIAL NOT GRANTED, WHEN.

A judgment which is well supported by testimony will not be disturbed upon the ground that the finding was against the weight of the evidence.

Appeal from the District Court of Montrose County.

Mr. A. MACON, for appellant.

Messrs. GOUDY & SHERMAN, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

This action was brought by the Montrose Mercantile Company to recover for goods, wares and merchandise sold and delivered to R. T. Jones and S. J. Tanner as partners. The cause was tried to the court without a jury. At the time of the trial the following facts were agreed upon:—

“That the Montrose Mercantile Company is existing as alleged in complaint; that at the time or during the times mentioned in the complaint, the plaintiff company sold goods to R. T. Jones, defendant, and delivered the same, and that others were sold and delivered to one Robinson, purchaser, and delivered to him on the order of R. T. Jones. And it is agreed that the amount sued for is the amount standing on the books unpaid. And it is agreed that if the judgment

goes against the defendants, it shall be at the legal rate of interest and without attorneys' fees. That the only issue between the parties is as to whether or not the defendants, R. T. Jones and S. J. Tanner, were partners and jointly obligated for the amount agreed to be due on the books.

By this agreed state of facts every issue is eliminated from the controversy save and except the one of partnership and the joint obligation. Under the issue thus presented a great amount of testimony was introduced on both sides, and from the testimony the court found that the defendants were partners, and rendered judgment against them in favor of plaintiff for the sum of \$457.69 with interest from January 1, 1888, and for the plaintiff against R. T. Jones individually for the sum of \$212.57, with interest at the rate of ten per cent from January 1, 1888. To reverse this judgment against the two defendants, Jones and Tanner, this appeal is prosecuted.

The argument on the part of the appellants is addressed exclusively to the fact that the finding of the court was unwarranted by the evidence.

We have thoroughly examined the evidence presented by the original and supplemental abstracts, and feel justified in saying that sufficient appears to support the judgment. To recite the testimony would serve no good purpose, as the well known rule of this court, as well as that of the supreme court, is that where sufficient testimony appears to support the verdict of the jury or the finding of the court, the judgment or verdict will not be disturbed.

The judgment must be affirmed.

Affirmed.

RHOADS ET AL., APPELLANTS, v. GATLIN, APPELLEE.

1. PRACTICE—TIME OF FILING DEMURRER.

A demurrer to an answer cannot be filed after expiration of the time prescribed by statute, and after a motion by defendant for judgment on the pleadings, without leave of court. The court was not bound to consider a demurrer so filed.

2. MEASURE OF DAMAGES.

Plaintiff held a chattel mortgage upon certain cattle, and obtained possession of the cattle by replevin against the mortgagee. He sold the cattle for more than the amount of the claim secured by the mortgage. *Held*, that the defendant might recover in the replevin case the amount received for the cattle in excess of the debt.

Appeal from the District Court of Las Animas County.

Messrs. WILSON & STIMSON, Mr. C. REED, Messrs. BRYANT & LEE and Mr. C. S. THOMAS, for appellants.

Mr. WM. O'BRIEN, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

It appears from the record in this case that on the 1st of March, 1888, the defendant executed a chattel mortgage upon one hundred and twenty-six head of cattle to secure the payment of a certain promissory note for the sum of \$265.

That said note having matured, plaintiffs failing to obtain possession of the cattle upon demand, instituted a suit in replevin, alleging special property in the cattle.

Defendant answered, and among various defenses set up that by virtue of the writ of replevin the defendant secured the possession of the cattle and thereafter, for some reason which is unquestioned, and before the period of time for answer had expired, plaintiffs caused the property to be sold, realizing the sum of \$650.

That the plaintiffs, though repeatedly requested by defend-

ant to apply the sum of money so received by them for the sale of the cattle to the payment of the note, and to render up to defendant the surplus due to defendant, have declined. Wherefore defendant demands judgment against plaintiffs for the sum of \$401.

To this defense no answer was made, nor demurrer or motion to strike out interposed, within the period of time fixed by the statute.

Defendant filed a motion for judgment upon the pleadings. After the filing of said motion plaintiffs interposed a demurrer. The court thereupon proceeded to pass upon the controversy between the parties as set forth in the pleadings.

Before the entry of the decree the defendant conceded that the plaintiffs were entitled to a judgment against the defendant for the possession of the property described in the complaint.

The finding of the court was that at the commencement of the action the plaintiffs were entitled to the possession of the goods and chattels described in the complaint.

That the plaintiffs recover from the defendant their costs expended for the recovery of the possession.

That defendant recover from plaintiffs the sum of \$401 and interest thereon from the 28th day of January, 1889, at the rate of ten per cent per annum, with costs expended to be taxed, and that he have execution therefor.

That there be credited upon the execution the amount of costs actually paid by plaintiffs prior to the issuance thereof.

That from the proceeds of the sum actually collected in payment and satisfaction of the execution there shall be paid all costs then remaining due and unpaid, to the officers of the court, and the balance remaining in the hands of the sheriff shall be paid to defendant.

That the note and chattel mortgage be canceled.

To the rendering and giving of this judgment, plaintiffs duly excepted and prayed an appeal.

It is insisted that the court erred in rendering judgment upon the pleadings, because a demurrer was then pending

to the defendant's answer. And that the answer is in the nature of a counterclaim for a sum of money that accrued after the commencement of the action.

The contention of appellants is not supported by reason or authority. The filing of the demurrer, after the interposition of motion for judgment upon the pleadings, and after the expiration of the time fixed by the statute for answer, demurrer or motion, was without the consent of the court and was without authority in law.

Under the state of the pleadings no default was necessary. The defendant had answered and set up a demand against the plaintiffs, which demand the defendant had neglected to defend against, and the court was under no obligation to pass upon the demurrer which has been so filed.

The answer distinctly sets up facts which stand uncontroverted, to the effect that the note has been satisfied, that the mortgage should be canceled, and that out of the sale of the property so taken by the plaintiffs they are entitled to the sum of \$401.

Our conclusion is, that the action of the court was warranted by the condition of the pleadings and is fully supported by the authorities. To remand this cause and compel the defendant to institute suit for the purpose of recovering the excess of money realized by the sale of the cattle is, in our judgment, unnecessary.

We are unable to find any error in the record which warrants us in disturbing the judgment of the court below.

The judgment must be affirmed.

Affirmed.

SMITH, PLAINTIFF IN ERROR, v. THE PEOPLE, DEFENDANTS IN ERROR.

1. VENUE—REAL ACTIONS.

It is provided by sec. 25 of the Civil Code that an action involving real estate shall be tried in the county in which the land or some part thereof is situate.

2. VENUE—JURISDICTION.

If such an action is brought in the wrong county, the court cannot retain jurisdiction after motion in apt time by the defendant to change the place of trial to the county in which it ought to have been commenced.

3. CHANGE OF VENUE A PRIVILEGE—JURISDICTION.

The right to a change of place of trial in an action commenced in the wrong county is a privilege which may be waived, but when properly demanded, it divests the court of jurisdiction to proceed.

4. DISQUALIFICATION OF JUDGE.

The fact that the judge of the district court of the proper county is disqualified to try the case is not a warrant for commencing an action in the wrong county, neither does it authorize the court in which it may be improperly commenced to retain jurisdiction.

5. DISQUALIFICATION OF JUDGE, WHEN CAUSE FOR CHANGE OF VENUE.

The disqualification of a district judge is never a cause for changing the place of trial, except when a competent judge of another district cannot be procured to appear and try the action.

6. MANDATORY INJUNCTION WITHOUT NOTICE, VOID.

A mandatory writ of injunction issued without notice is absolutely void.

7. DISOBEDIENCE OF VOID WRIT NOT A CONTEMPT.

A failure or refusal to obey a void writ of injunction does not constitute a contempt of court.

8. IRREGULAR AND VOID WRITS, DISTINCTION BETWEEN.

There is a well defined distinction between a writ of injunction improvidently or erroneously issued by a court having jurisdiction, and one issued by a court without it. In the one case the writ must be obeyed implicitly, no matter how improvidently or erroneously issued; in the other the writ is absolutely void, entitled to no respect and demanding no attention.

Error to the District Court of Arapahoe County.

It appears that some time prior to the year 1882 (date not shown), three individuals, Leese, Davis and Bingel, construct-

2	99
3	353
2	99
4	492
2	99
8	162
23c	232
2	99
11	348
12	546
25c	36
2	99
17	240
17	248
30s	129
31s	467
2	99
378	92
378	421

ed a small ditch some five miles long to convey water to irrigate their separate farms. Such ditch was taken out of the Rio Grande river in Rio Grande county, and was known as the "Bingel" ditch; that they remained the owners of the ditch until some time prior to December, 1882, when they sold and transferred the ditch and water rights to one J. S. Stanger, who at once proceeded to reconstruct and enlarge the ditch, using the Bingel ditch and right of way, taking the water from the same point and putting in a headgate at the point where the headgate of the Bingel ditch had formerly been.

Plaintiff in error and his partner, John M. Wilson, were employed by Stanger in enlarging and reconstructing the ditch. Stanger being indebted to them in the sum of \$9,432.33 and failing to pay, they, in April, 1884, obtained a judgment for that amount against Stanger and for costs, which was by the court decreed to be a lien upon the Leese, Davis and Bingel ditch. Pursuant to such judgment and decree, all the right, title and interest of Stanger was sold by the sheriff and purchased by one Engley about the 1st of March, 1886. The sheriff made a deed of the interest sold to Engley, that Engley conveyed to plaintiff in error, and he became the owner of whatever interest passed by virtue of the sheriff's sale.

It also appears that a corporation known as "The State Land No. 2 Canal Company," during the time the foregoing proceedings were being had, came into possession of the five miles of canal reconstructed and enlarged by Stanger, as his successor, and used it as the head or upper part of a long and extensive canal and water system by it constructed from the lower end or terminus of the Stanger construction, the whole system being continuous; and the "Empire Land & Canal Company" succeeded to the rights of the State Land No. 2 Canal Company, and went into the possession, connecting it at its southeast terminus with the canal and water system of such Empire company and making the system continuous, the water being taken through the headgate and

canal of the Stanger, formerly Leese, Davis and Bingel portion.

Prior to April, 1889, (date not given) the Empire Land and Canal Company instituted a suit against plaintiff in error and others in the district court of Rio Grande county, setting up its title to the five miles of ditch in controversy, as owner, alleging the proceedings and sale whereby plaintiff acquired his pretended title, were void. That the deed executed to Engley and conveyance by Engley to plaintiff were a cloud upon its title, and asking its removal. Issues were made up and a trial had upon the merits, resulting in a decree for plaintiff in error (defendant) on the 15th of April, 1889, that he was the owner and that the suit be dismissed. The Empire Company prosecuted an appeal from the decree to the supreme court, where the matter is still pending. Upon the entering of the decree and dismissal of the suit in the district court, plaintiff in error took possession of that portion of the ditch claimed by him, including the headgate; evicted the Empire Canal Company and forcibly retained the possession, no supersedeas having been granted by, nor application having been made to the supreme court for an injunction.

While matters were in this situation the Empire Canal Company filed an original bill in the district court of Arapahoe county, averring its title to the property, and narrating the facts above stated, praying:—

First.—That defendants be enjoined “from interfering with plaintiff’s control and enjoyment of the said headgate of the said Empire Canal; from in any way obstructing the flow of water in said canal, either at the headgate or at any other point on the canal; and from interfering with the operation of said canal by the plaintiff in any respect whatever.”

Second.—“Enjoining and restraining the defendants * * * from interfering, keeping or maintaining their possession of the property of the Empire Land & Canal Company, its headgates or any part of its canal as above mentioned; and from keeping in their or either of their possession the

keys to the headgates * * * and from keeping the said plaintiff company or any of its agents or employees from the full and entire possession of all the canal and property of the said canal company * * *." In response to such prayer, a preliminary injunction was issued—without notice to defendants—mandatory in character, following the wording of the prayer, commanding, in effect, the defendants to deliver the possession of the portion of the canal by them held, the headgate, keys, etc., to plaintiff company. The writ was served and disregarded by defendants, who were at the time engaged in constructing a dam across the canal a short distance below the headgate, to prevent water from flowing in the canal, also, in cutting through the bank of the canal at a point above the dam to turn out and into the river whatever water passed in through the headgate. Such work was continued and completed some 36 or 48 hours after the service of the writ, and at the time and subsequently, possession of that portion of the canal, the headgate and keys were retained by the defendants.

The bill appears to have been filed and order for the injunction made on April 23, 1889; the writ served upon Smith on April 24th; on the 25th a demurrer for want of equity was filed to the complaint, and on the same date the following motion was filed:

"Come now the defendants and move the court to change the place of the trial of this cause to Rio Grande county, Colorado, for the reason that it appears upon the face of the complaint, that this is an action for the determination of rights and interests in and injuries to real property situate in said Rio Grande county." No action was taken upon the motion. No proceedings, charging the defendant, Smith, with contempt in violating the injunction, were instituted until May 2d, when affidavits having been filed charging the contempt, an order was made requiring the defendants to appear on May 4th. Defendants appeared and answered. Afterwards, a mass of oral testimony was taken, mostly going to the merits of the controversy as to the rights of the respective parties to

the property in dispute. On the 8th of May the defendant, Smith, was adjudged guilty of contempt and fined \$250, to be paid within 24 hours, and in addition thereto the following was made a part of such judgment:

“And it is further ordered by the court, that the said Daniel R. Smith, defendant, within three days from this date, remove the dam and all obstructions by him placed in the canal of the said plaintiff mentioned in said order, and repair the bank of the said canal by him cut as aforesaid, and in all things restore the said canal and the property which was heretofore in possession of the said plaintiff to the like condition it was in when the defendant took possession thereof; and that the defendant, Daniel R. Smith, and all the defendants, their agents, attorneys and employees, immediately obey the orders of said court heretofore issued, and that in the event the defendant Smith fails to restore the said canal and property of the plaintiff to the same condition, as near as may be, that it was in when he took possession thereof, within three days from the date of this order, the defendant, Smith, be arrested and committed to the jail of the county of Arapahoe, state of Colorado, there to be confined until the order of said court heretofore issued herein shall in all things have been fully obeyed and complied with.”

Mr. C. A. JOHNSON, Mr. ADAIR WILSON and Mr. D. V. BURNS, for plaintiff in error.

Mr. J. H. MAUPIN, attorney general, for defendants in error.

REED, J., after stating the facts, delivered the opinion of the court.

Preliminary to the discussion of supposed errors as assigned and presented by counsel, arises a question, novel in character, but seemingly of great importance, or rather several questions.

First. The district courts of Rio Grande and Arapahoe counties being courts of equal and concurrent jurisdiction, and the right of the parties and the title to the property having been adjudicated and a final decree entered in the district court of Rio Grande county—were not the matters, as far as district courts were concerned, *res adjudicata*? After the final decree, from which an appeal was taken to the supreme court, such decree could not be vacated nor the decreed rights of parties affected but in one of two ways. First, by the setting aside of the decree and granting a new trial in the trial court; second, by a reversal of the decree in the supreme court; neither of which had been done. By entertaining the bill presented and proceeding to grant equitable relief by injunction, the district court of one district assumed the power to review the findings of a court of concurrent jurisdiction in another district; for the right to equitable relief must have been determined upon the same facts adjudicated in the other court, consequently, a different finding must be predicated upon the facts already adjudicated. It cannot be said that the district court of Arapahoe county assumed jurisdiction in ignorance of these facts, for they are stated in the complaint, where, after stating the premises and institution of the suit, it is said: “That upon issue being joined by the defendant in the said suit, the trial of said case was had at the last term of the district court of Rio Grande county, holden at Del Norte on or about the 15th of April, 1889, and that the said court after hearing the said case, rendered a decree dismissing the bill of complaint of the said plaintiff * * * from which decree the Empire Land & Canal Company has appealed to the supreme court.”

Previous to such appeal, jurisdiction of the subject-matter in controversy was in the district court of Rio Grande county. By the appeal the district court of Rio Grande county was divested of jurisdiction and it was vested in the supreme court, which had full and sole power to grant relief by supersedeas, injunction or otherwise. The question is not presented for determination, nor will it be definitely determined.

By the bill of complaint it was shown that the property in controversy was real property situate in Rio Grande county. On the 25th of April, two days after presenting the complaint, a motion was made to change the venue to that county. The motion was filed some days before the proceeding for contempt was instituted, was not disposed of, and as far as shown by the record, remains undisposed of. If prior to that time the court had jurisdiction—was it not by such application deprived of all jurisdiction to proceed?

By sec. 25 of the Civil Code it is declared that such actions shall be tried in the county in which the subject of the action, or some part thereof, is situated.

It was apparent upon the face of the complaint that it pertained to real property in Rio Grande county, hence, that the district court of Arapahoe county could not retain jurisdiction for adjudication after the motion to change was made. We are satisfied that this is a correct construction of the statute, and this conviction is strengthened by the construction of the same and similar statutes in other states. See *Veeder v. Baker*, 83 N. Y. 156; *Bonnell v. Esterly*, 30 Wis. 549; *Woodward v. Hanchett*, 52 Wis. 482; *Meiners v. Loeb*, 64 Wis. 343; *Watts v. White*, 13 Cal. 321; *Cook v. Pendergast*, 61 Cal. 72; *Heald v. Hendy*, 65 Cal. 321.

We can find no case in our own courts where the point has been decided. The nearest approach to it was in *Fletcher v. Stowell*, 17 Colo. 94, but the question presented in this case was not involved. Suit was brought in Lake county to foreclose a mortgage on real property in Eagle county. Defendants made no appearance and a decree of foreclosure was taken by default and sustained, the court holding that it was not incumbent upon the court to change the case to Eagle county of its own motion, and that the right to a change was waived by a failure to appear. In this case there was an appearance and a motion. Nothing in that case militates against the position taken here. The district courts being courts of general jurisdiction, the case would be retained unless the defendant asserted his right to have it tried in the

proper county. The right to change is a *privilege*. It may be waived, but when asserted, the statute is peremptory, and the court has no jurisdiction to proceed, and all further acts will be void. To hold otherwise would abrogate the statute.

In sec. 29 of the Code it is provided that the court "may change the place of trial when from any cause the judge is disqualified to try the action;" but it is also provided, "the court shall not change the place of trial for the disqualification of the district judge in any case where a competent judge of another district court will appear and try the action." An affidavit was filed in the district court of Arapahoe county, stating that the district judge of Rio Grande county had been of counsel, but this was an unwarranted proceeding, there being no provision in the statute for conferring jurisdiction in that manner. It could only be effective by the application having been made in the county where, by the requirements of the statute, the case could properly be tried. Then there could be no change to another forum if a competent judge could be procured.

III. In addition, the writ of injunction was void for want of notice and jurisdiction of the defendants, even if it had had jurisdiction of the subject-matter of the controversy. The application was *ex parte*, the relief granted, a mandatory injunction directing a delivery and change of possession of real property and directing other acts to be performed, it was a judgment or decretal order, frequently called "a judicial writ," that could only legally follow a final judgment or decree. A final judgment and decree had been entered by the district court of Rio Grande county, but finding the defendant to be the owner. Such decree carried with it the right of possession and the right of entry—could only be stayed by injunction or a supersedeas from the supreme court, which had jurisdiction by the appeal. The acts of the district court of Arapahoe county in assuming jurisdiction and issuing the mandatory writ were, in effect, the assumption of the powers of the supreme court to review the proceedings of the district court of Rio Grande county,

which it exercised without notice to the defendants, *ex parte*, reviewing and reversing the decree of a court of concurrent jurisdiction and without adjudication changing the possession. That a mandatory writ of the character issued in this case can only be a legal writ when based upon a judgment or decree, unless authorized by statute, has been so frequently held, it is hardly necessary to cite authorities in this support.

In Story's Eq. Juris. § 861, it is said: "The most common form of injunctions is that which operates as a restraint upon the party in the exercise of his real or supposed rights; and is sometimes called the remedial writ of injunction. The other form, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same; as, for instance, it may contain a direction to the party defendant to yield up, or to quiet, or to continue, the possession of the land, or other property, which constitutes the subject-matter of the decree in favor of the other party." See High on Injunc. § 4; *D. & N. O. R. R. Co. v. A. T. & S. F. R. R. Co.*, 13 Fed. Rep. 546; *Arnold v. Bright*, 41 Mich. 210; *Railway Co. v. Railway Co.*, 61 Mich. 9; *Spofford v. Railway Co.*, 66 Me. 51; *Wangelin v. Goe*, 50 Ill. 459.

Our statutes contain no provisions or exceptions in this class of cases, taking them out of the well settled rule of equity; the only innovation upon the rule, by statute, conferring upon the courts such extraordinary power is in the case of mines, sec. 159, Civil Code, and in those cases, by sec. 160, the writ is declared void if issued without notice. Under the provisions of the statutes, as well as established principles of equity, the mandatory writ was absolutely void for want of notice as well as from want of adjudication.

IV. The writ being void, no proceedings for contempt could be predicated upon a refusal to obey it. There is a wide and well defined distinction between a writ improvidently or erroneously issued by a court having jurisdiction of the subject-matter and parties, and one issued without such ju-

risdiction. In the first instance, the writ must be implicitly obeyed, no matter how erroneous, unless vacated or dissolved. 2 Danl. Chy. Prac. 1743-4; Kerr on Injunc. *569; *Woodward v. Earl of Lincoln*, 3 Swans. 626; *Spokes v. Banbury B. of H.*, L. R. 1 Eq. Cas. 41.

In the latter case, the writ is not voidable but absolutely void—is no writ—entitled to no respect and demanding no attention. *Haines v. Haines*, 35 Mich. 143; *Browne v. Moore*, 61 Cal. 432; *Pennsylvania v. Wheeling B. Co.*, 18 How. 421; *Ex parte Fiske*, 113 U. S. 718; *Worden v. Searles*, 121 U. S. 14.

It follows that the court erred in finding the defendant guilty of contempt in refusing to obey the writ of injunction.

Such finding will be reversed and the cause remanded with instructions to discharge the defendant and dismiss the bill of complaint.

Reversed.

STEVENSON ET AL., APPELLANTS, v. CLARKE, APPELLEE.

JURISDICTION.

When the judgment appealed from does not amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold, neither the supreme court to which this appeal was taken, nor this court to which it was transferred, has jurisdiction to entertain the appeal.

Appeal from the County Court of Arapahoe County.

Messrs. PENCE & PENCE, for appellants.

No appearance for the appellee.

PER CURIAM. By the record in this case it appears that the court rendered judgment to the effect that the plaintiff have and recover of and from the defendants a square grand

piano, or that she have and recover of and from the defendants the sum of \$95, with her costs. To reverse this judgment this appeal is prosecuted.

The provisions of the act under which the appeal is prosecuted provides that appeals to the supreme court from the district, county and superior courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold.

The supreme court was without jurisdiction to entertain the appeal, and under the conclusion reached by this court in the case of the *Board of County Commissioners of Pitkin County v. The Aspen Mining & Smelting Company*, 1 Colo. Ct. Ap. 125, the appeal must be dismissed.

Dismissed.

EDWARDS, APPELLANT, v. HARVEY, APPELLEE.

1. DRAFT, WHEN NOT PAYMENT.

The defendant sent a draft to plaintiff, as a payment on account. It was not paid, and plaintiff was guilty of no laches in his efforts to collect, but returned it within a reasonable time. *Held*, that defendant was not entitled to credit for its amount.

2. JUDGMENT WHEN ADMISSIBLE IN EVIDENCE.

In an action on an account, evidence of a judgment previously obtained by the plaintiff against the defendant, included in the account, is admissible, where it appears that the judgment was obtained at the request of the defendant, and upon an understanding that he was to pay a certain portion monthly and not to be pressed for payment in full.

3. OBJECTIONS AND EXCEPTIONS, WHEN NECESSARY.

No objection to testimony will be considered on appeal when the evidence was admitted without objection or exception.

Appeal from the District Court of Lake County.

THE facts are stated in the opinion of the court.

Mr. J. E. HAVENS and Mr. A. T. GUNNELL, for the appellant.

No appearance for the appellee.

RICHMOND, P. J., delivered the opinion of the court.

By the record in this case it appears that plaintiff sought to recover from the defendant the sum of \$1,836.46, with interest, balance of an account for goods sold and delivered to defendant, for moneys paid out, and for services rendered.

To the complaint the defendant answered denying the allegations, and interposed a counterclaim, alleging that the plaintiff was indebted to him, the defendant, in the sum of \$304.65.

Plaintiff replied, denying the allegations in the counterclaim, and alleged that an account was stated between the parties and a balance found to be due plaintiff from defendant in the sum of \$1,836.46, which defendant agreed to pay.

The pleadings in this case, as appears by the record, stand unchallenged. And, although the record fails to disclose whether the case was tried to the court without a jury, we are warranted in assuming that such was the fact. The cause appears to have been thoroughly tried, and a large amount of credits agreed to upon both sides. After hearing all of the testimony the court found for the plaintiff to the amount of \$1,887.33. To reverse this judgment defendant prosecutes this appeal.

During the progress of the trial a transcript of a certain judgment previously obtained by the plaintiff against the defendant and one H. C. Henry was offered in evidence, and also testimony with reference to another judgment and costs thereof, which it was claimed Edwards was personally responsible for.

Two propositions are argued by counsel for appellant: First. The court erred in permitting the plaintiff to introduce evidence of and concerning the judgments. And, second,

that the court erred in allowing plaintiff credit for the sum of \$80.

It is insisted that a draft was given to the plaintiff for the sum of \$80 by the defendant, and that plaintiff neglected to collect the amount of the draft, and also neglected to return the same to the defendant. That by his laches the amount of the draft was lost to the plaintiff, owing to the subsequent insolvency of the parties upon whom the draft was drawn.

We do not think that appellant is in a position to object to the introduction of evidence concerning the judgments. So far as one of the judgments is concerned, it was obtained upon an agreement made between Harvey and Edwards, and we think it can be said that the evidence shows that it was obtained at the request of Edwards, with the understanding that he would pay it as soon as possible, and with the additional understanding that he was not to be pressed for payment in full, but was to pay a certain portion monthly. The amount of the judgment was included in the account and, under the circumstances, evidence concerning it was clearly admissible.

As to the testimony concerning the second judgment, the record discloses no objection or exception to the testimony with reference thereto. Consequently, it is not in this case for our consideration. Besides this, we are clearly of the opinion that it was the duty of the plaintiff to unite in this action all the items of account against the defendant, and that the evidence relative to the judgment was admissible.

In regard to the question raised concerning the draft, sufficient evidence appeared to warrant the court in concluding that the plaintiff had not been guilty of laches in his efforts to collect the same, and also that he had within a reasonable time after endeavoring to collect it returned it to the defendant. And from the meager record we are unable to conclude that an unreasonable time had elapsed between the receipt of the draft and the return thereof. In truth we are prepared to say that there is no question properly presented for our consideration which would warrant us in disturbing

the judgment. On the contrary, we are strong in our belief that the differences between the parties were justly and equitably dealt with by the trial judge.

The judgment must be affirmed.

BISSELL, J., having been of counsel, not sitting.

Affirmed.

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LEE, APPELLANT, v. THE JUSTICE MINING COMPANY,
APPELLEE.

1. ALIENS CANNOT LOCATE MINING CLAIMS.

None but citizens of the United States and those who have declared their intention to become such, can acquire any right to public mineral lands by location.

2. ASSIGNMENT OF LOCATION BY ALIEN VESTS NO RIGHT.

An alien cannot by assignment or conveyance to a citizen transfer any better or greater right than he himself possesses.

3. HOLDER OF LEGAL TITLE, WHEN TRUSTEE.

If for any reason recognized by courts of equity as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience and by law, it ought to go to another, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title.

4. SAME.

When a location has been attempted to be made by an alien and his assignee has obtained a receiver's receipt based thereon, one who had made a valid location upon the premises prior to the issuance of the receiver's receipt may invoke the principle above stated for the purpose of acquiring the legal title.

Appeal from the District Court of Pitkin County.

COMPLAINANT alleges that he is a citizen of the United States and over the age of 21 years; that on the 20th day of May, 1887, he entered upon the unoccupied and unappropriated public mineral domain of the United States, and at the said unoccupied point of his entry sunk a shaft to the depth of more than ten feet below the lowest part of the rim there-

of, and therein and thereby discovered and disclosed a well-defined body of mineral bearing rock in place, containing silver and other precious metals; that at said shaft and said point of discovery, he posted a stake on which was placed a plain sign and notice, containing the name of the lode, to wit: The Aftermath, the name of the locator and the date of the discovery, the number of feet claimed on each side of the center of the discovery shaft; and staked the said claim at the corners and at the center of the said line with stakes marked and hewn on the sides in towards said claim, and in all other respects complied with the state and federal statutes relative to the location of mining claims.

And thereupon caused to be made out a location certificate, containing all of the several matters aforesaid, together with a description of said claim.

That the Justice Mining Claim was located on the 8th day of October, 1885, by one Edwin Doust, and that at the time of said location the said Doust was an alien and had never heretofore, or yet, declared his intention to become a citizen of the United States.

That the said claim so located by the said Doust covers a part and portion and conflicts with the claim located by plaintiff and called the Aftermath lode mining claim, for the entire width of the said Aftermath lode, to wit: three hundred feet, and for a distance in length of upwards of five hundred feet.

That after the said location, the said Edwin Doust, as plaintiff is informed and believes and so charges the fact to be, made a contract with one William Lawson on the 13th day of October, A. D. 1885, to sell and transfer the said claim to said William Lawson.

That on the said day he made, executed and delivered to John W. Richards, one of the defendants herein, a deed transferring all his right, title and interest in and to said premises to the said Richards; that said transfer was utterly and entirely without consideration, having no express consideration except the sum of one dollar, and was made solely

and simply that the title might pass to a citizen of the United States for the purpose of procuring a title to the claim from the government. That concurrently with the said deed to the said Richards, and in execution of the agreement to transfer the title by Lawson, the said Richards executed a title bond to the said Lawson, wherein and whereby he agreed to convey to said Lawson the said Justice Mining Claim with other properties for certain considerations therein named. That at the time of the transfer by said Lawson, and the making of said agreement, the said Lawson was and is now an alien, and has never declared his intention to become a citizen of the United States.

That notwithstanding the fact that the said property was apparently by said deed conveyed to said Richards, the said Richards held the same for the sole use and benefit of said Lawson, agreeing to hold title to said claim until after the procurement of the government title to said property; whereupon he was to transfer the same to Lawson, or to whomsoever he might direct. And that, while the said property thus stood in the name of John W. Richards, he made application for patent from the United States, and on or about the 20th day of February, 1886, he commenced his advertisement therefor, which said application was completed on April 23, 1886; that the title, so far as the records are concerned, and so far as the public is concerned, stood in the name of the said Richards from the time of the transfer to him by said Doust until the 11th day of June, 1887, at which time there was recorded a deed from said Richards to Joseph Ruse as trustee for the Justice Mining Company.

That the said Joseph Ruse had not the slightest interest in the said property, but was simply invested with a naked legal trust, holding the title thus conveyed under an obligation to transfer it to the said mining company in pursuance of the scheme heretofore and hereinafter stated. That the said deed to said Joseph Ruse bears date April 30, 1886, and was never filed for record or recorded until June 11, 1887, and was executed for the express and nominal consideration

of one dollar. That a receiver's receipt was issued to John W. Richards on June 14, 1887, and duly filed in the recorder's office June 17, 1887.

That the Justice Mining Company was organized and became incorporated on the 30th day of April, 1886, with a nominal capital of one hundred thousand dollars. That the share division was ten thousand shares; that the corporation was organized concurrently with the execution of said deed to said Joseph Ruse as trustee, and that the said deed was executed upon the express understanding and agreement by and between said Ruse and said Richards and said Lawson, that the said Richards should hold title to said property until such time as the government title thereto should be acquired, and that the deed should remain in escrow with said Ruse to be transferred to the company when the title should be obtained, and that when the title should be procured, then the title should be conveyed to the Justice Mining Company, which company should transfer to said Lawson his proportionate sharehold interest in the said corporation.

That the organization of said corporation, as well as the transfer of title to said Richards and Ruse, was a part and parcel of the scheme to obtain the title from the government which should not be open to question, for the reason that the title was in a citizen of the United States and not an alien. That of all the several acts and facts aforesaid the plaintiff was not advised until after the application for patent had been made and until the time of the issuing of the receiver's receipt from the government.

That immediately upon the procurement of the government title as aforesaid, and the transfer of the said title from the said Ruse to the said company, the company issued its shares of stock of the nominal value of fifty-six thousand dollars, and fifty-six hundred in numbers, and delivered the same to William Lawson as the consideration of the transfer of the title of the said Justice Mining Company to said corporation. That upon the organization of said company various and sundry other properties were conveyed to it, together

with said claim. That prior to the time of the transfer of said property by the said trustee to said corporation, and while the title still remained in said fraudulent grantees, Richards and Ruse, the plaintiff's title had already become vested by reason of his location of the Aftermath lode mining claim and by reason of the absolute invalidity and nullity of the title of the said Lawson and Doust to the said Justice Mining Claim.

That the said receiver's receipt so issued is a cloud upon the title of plaintiff to the Aftermath lode mining claim, and that it is impossible for plaintiff to bring an action in ejectment for the purpose of determining the title of the said company to said claim, because of the fact that in an action in ejectment the company would set up the possession of the legal title acquired from the government in bar of any action which plaintiff might bring to determine his right to the Aftermath lode mining claim, in so far as it conflicts with the said Justice Mining Claim.

That said property is valuable only for the mineral which it contains. That the Justice Mining Company is without any property or means whatsoever save the mining claims which it holds, which decrease in value as fast as the mineral is taken and removed therefrom. That Lawson is absolutely insolvent, and threatens to sell and dispose of his shares, and that plaintiff has filed in the United States land office his petition in the form of the protest, asking the withholding of the patent to the Justice lode until such time as this suit may be heard and determined.

To this complaint a demurrer was interposed:

First. Because the action should be an action of ejectment and not an action in the nature of a bill to quiet title.

Second. Because the United States alone can take advantage of the alleged fraud.

Third. Because no fraud or violation of the law is alleged in the complaint either against the defendants or the United States.

Fourth. Because the allegations of the alleged fraud can

be pleaded in an action of ejectment against alleged bar of receiver's receipt.

Fifth. Because the complaint does not state facts sufficient to constitute a cause of action.

Sixth. Because the court has no jurisdiction of the subject-matter of the case.

The demurrer to the complaint was sustained and plaintiff elected to stand by the complaint and prayed an appeal to the supreme court of the state of Colorado, which was duly perfected and the cause thereafter transferred under the statute to this court.

MR. C. R. BELL and MR. J. B. BISSELL, for appellant.

Messrs. WILSON & STIMSON, MR. A. W. RUCKER and Messrs. TITCOMB & EWING, for appellee.

RICHMOND, P. J., after stating the facts, delivered the opinion of the court.

From the foregoing it will be observed that two questions are presented for our consideration :

1. Is the action a proper one. Can the plaintiff institute an equitable action for the purpose of determining his title under the state and federal statutes to a mining claim notwithstanding the fact that the receiver's receipt has been issued to one of the defendants who has transferred the title thus acquired to the Justice Mining Company.

2. Can an alien acquire such an interest in a mining claim by location as can be transferred to one or more parties by various conveyances, and through such claim so transferred can title be obtained from the government of the United States against which plaintiff cannot assert a prior acquired legal right.

By the demurrer it is admitted that the plaintiff is a citizen of the United States.

That on the 20th day of May, 1887, he entered upon and

located the Aftermath mining claim, which was then unoccupied and unappropriated public mineral domain.

That he discovered and disclosed in said claim a well defined body of mineral bearing rock in place, containing silver and precious metals.

That he properly complied with the state and United States laws in locating the claim.

That Edwin Doust located his claim in October, 1885. That at the time of said location and up to the time of filing the complaint in this action he was an alien. That the claim located by Doust conflicts with the Aftermath lode to the extent of three hundred feet in width and upwards of five hundred feet in length.

That Doust entered into a contract to sell to Lawson, and on the 13th of October executed a deed to John W. Richards without consideration solely for the purpose of having Richards procure the title to the claim, he being a citizen of the United States.

That Richards executed a title bond to Lawson who was an alien; that while the property stood in the name of Richards he made his application for a patent and subsequently acquired a receiver's receipt, and thereafter transferred his right to Joseph Ruse as trustee for the Justice Mining Company.

That Ruse thereafter transferred to the company, and received in consideration, shares of stock of the nominal value of fifty-six thousand dollars.

That prior to the time of the transfer by the trustee to the company, plaintiff's title had become vested by reason of his location of the Aftermath lode mining claim, and by reason of the invalidity of title in Doust or Lawson.

That the mining company is without means to satisfy a judgment for damages and that Lawson is equally insolvent.

To recapitulate the foregoing amounts simply to this, that whatever title the Justice Mining Company has to the land in controversy, has been acquired through the location of an alien, and conveyance by him to an alien, and a subsequent

conveyance to a citizen of the United States solely for the purpose of acquiring title, and who conveyed to Ruse to hold as trustee for the company who thereafter conveyed by direction of the alien to the Justice Mining Company.

For personal convenience we deem it proper to consider the second issue first. And this presents the question of an alien's right to acquire such an interest as can be sold, and upon which a subsequent title can be predicated.

In the case of *Warren Hussey et al., Application for the Kempton Mine*, Sickles' Mining Laws and Decisions, 92, Delano, secretary of the interior department, uses this language: "An assignor can transfer no greater interest to his assignee than he himself possesses. While he is unnaturalized, he has no right to locate a mine. If he does so, and disposes of it before naturalization, a subsequent naturalization would not, in my opinion, save his location. If, therefore, it appeared in this case that the original locators were not citizens, or had not declared their intention to become such at the time their location was made, and that they had not become citizens when they transferred the mine, I should have no hesitation in holding that the transfer was invalid and the claim of the applicants was not good."

In the case of *Golden Fleece v. Cable Con. Co.*, 12 Nevada, 312, it was held that, "An alien who has never declared his intention to become a citizen, is not a qualified locator of mining ground, and he cannot hold a mining claim either by actual possession or by location, against one who connects himself with the government title by compliance with the mining law."

In *North Noonday Min. Co. v. Orient Mining Co.*, 1 Federal Reporter, 522, it was held that, "Under the act of congress of May 10, 1872, relating to the public mineral lands, none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to such lands by location."

In *Tibbits et al. v. Ah Tong et. al.*, 4 Montana, 536, the supreme court of Montana held, in an opinion delivered by

Wade, C. J., "That the right to locate and the right to possess a mining claim go together; they are part of the same grant, and neither can exist without the other. If, therefore, the grant by assignment or conveyance falls upon an alien, incapable of making a location, his possession is of no consequence, the possession being transferred to one who, under the statutes, is incapable of becoming a purchaser from the government. Such possession being part and parcel of the purchase is illegal, and is equivalent to an abandonment, and opens the ground to location and possession by any qualified person.

"The alien cannot become the government's grantee, and cannot become so in a roundabout way, by being the grantee of the government's grantee."

The last cited case is somewhat analogous to the case at bar. Here the location was made by an alien who transferred to an alien, and by the last a transfer was made to a citizen who acquired the title from the government, and through these various conveyances the title ultimately became the property of the Justice Mining Company, but nevertheless the original locator, Doust, retained an interest. All of the individuals, as appears by the complaint, were interested in the scheme to acquire the title to the land which the plaintiff herein had located, as a citizen of the United States, and in locating had fully complied with all the provisions of the mining laws. Before the title had passed to the Justice Mining Company from Ruse as trustee, his claim had intervened, against which the Justice Mining Company assert no right or claim, nor does it attempt so far as the present proceeding is concerned to attack his *bona fides* and his location.

In the case of *Bohanon v. Howe*, 17 Pac. Rep. 583, the supreme court of Idaho held that, "Under the act of congress of May 10, 1872, only citizens of the United States, and persons who have declared their intention to become such, can acquire any right of possession, by location or otherwise, of mineral lands on the public domain."

In *Lee Doon v. Tesh*, 8 Pac. Rep. 621, this doctrine is announced: "Persons who are not citizens of the United States, or have not declared their intention to become such, cannot acquire any vested right to the possession of a mining claim on United States public lands." *Territory of Montana, Respondent, v. Lee*, 2 Montana, 124.

In my researches I have been unable to find any authority which conflicts with the general doctrine thus announced: That an alien unnaturalized and who has not declared his intention to become a citizen of the United States, can acquire no right by location to any of the mineral lands of the United States. This being true, what interest then could the assignee legally acquire and convey through Richards to Ruse as trustee for the defendant company; and what interest so acquired by the company can it assert against the claim of the plaintiff, who is admitted to be a citizen and a proper locator, and who had made a legal location prior to the title becoming so vested in the company.

It seems to me that to argue that the title thus acquired is valid and legitimate is, to use the language of another, "a roundabout way to defeat the express provisions of the law." Provisions which every citizen of the United States will recognize as eminently proper and just, — provisions which the courts have universally held to be constitutional and legitimate legislation, and which no court of equity ought in the face of proper showing to permit to be negatived by a combination of one who is a citizen and two who are not.

Now is the action a proper one? We need not go beyond the doctrine laid down by the supreme court of the United States in cases cited by the appellee.

In *Johnson v. Towsley*, 18 Wallace, 80, Justice Miller, in delivering the opinion of the court, said: "That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts and in all forms of judicial proceedings, where this title must control, either by reason.

of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes. These are among the most ancient and well established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office."

In *Shepley et al. v. Cowan et al.*, 91 U. S. 330, it was held that, "The officers of the land department are specially designated by law to receive, consider and pass upon the proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. *If they err* in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from

one officer to another of the department, and perhaps, under special circumstances, to the president."

In *Moore v. Robbins*, 96 U. S. 530, in passing upon a similar question, the court say: "*If they err* in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions."

In *Steel v. Smelting Co.*, 106 U. S. 447, Justice Field, in delivering the opinion after passing upon the validity of the patent, uses this language: "Until set aside or enjoined, it must, of course, stand against a collateral attack with the efficacy attending judgments founded upon unimpeachable evidence. So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public land is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation."

These authorities and the authorities cited in the cases sufficiently sustain the position assumed by appellant, to the effect that they could not, by ejectment or other proceedings at law, legitimately inquire into the validity of the defendant company's title. That it was from necessity their duty, and under the decisions their right, to appear in a court of equity and therein assert their equitable right to the disputed land.

This is not a proceeding between the government and individuals, but a proceeding between private parties, wherein it is insisted that the claim or title of one is inequitable and void, because from its inception there has been no compliance

with the provisions of the state and federal statutes relative to the location and acquisition of title to mining claims, and that before any right or title had inured to the Justice Mining Company, complainant, as a citizen of the United States, had made the proper location and secured the right as such citizen, by full compliance with the law, to acquire the title to the disputed land.

In the *Eureka Case*, 4 Saw. 319, Field, J., uses this language: "A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences. But it is equally as clear, and as well settled, that, if the statute has not been complied with, and a patent issued without authority of law, no substantial title is acquired."

"A patent issued without authority of law is void." *U. S. v. Chapman*, 5 Saw. 528; *Stoddard v. Chambers*, 2 How. 285; *Morton v. Nebraska*, 21 Wall. 660; *Sherman v. Buick*, 98 U. S. 216.

Believing the foregoing to be the correct doctrine, we have but to quote further in support of complainant's bill.

In *Johnson v. Towsley*, *supra*, it is said, "That if for any reason recognized by courts of equity as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience and by the laws which congress has made upon the subject, it ought to go to another, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title." *Stark v. Starrs*, 6 Wall. 402.

"The relief given in this class of cases is founded on the theory that the title which has passed from the United States to the defendant, inured in equity to the benefit of plaintiff, and a court of chancery gives effect to this equity, according to its forms, in several ways." *Silver v. Ladd*, 7 Wall. 228.

The supreme court of this state has practically determined this question in the case of *Seymour v. Fisher et al.*, 16 Colo. 189.

In the case of *Seymour v. Fisher et al.*, the court uses this language: "It is needless to say that an investigation by a court of equity in the case now supposed is not for the purpose of attacking or annulling the patent itself; its object is to give the benefit of the patent to the proper party; the party who in equity is entitled to the premises. And when the foundation is laid by proof showing clearly the fraud of the applicant, whereby the complaining party has been kept in ignorance of the existence of the patent proceedings, the court may consider the right of such party to the ground in controversy." *Vide: Craig v. Leitensdorfer*, 123 U. S. 189.

In *Belk v. Meagher*, 104 U. S. 279, Waite, C. J., delivering the opinion of the court said: "The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. * * * The right to possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

It is needless to cite further authorities in support of the conclusion here reached. We are clearly of the opinion that so far as the record in this case at present discloses, the Justice Mining Company's title, based as it is upon an invalid location, cannot be supported by authority, reason, or statute.

To prove and establish a right to a patent from the government of the United States, it was clearly the duty of the party seeking the title, under the provisions provided by statute, to prove a valid location and a thorough compliance with the mineral laws.

If the allegations of the bill be true, such proof could not be made and cannot now be made, and the government officials were not authorized to issue a certificate of purchase or a patent for the land.

We think that the court erred in sustaining the demurrer to the complainant's bill.

The judgment must be reversed and the cause remanded for further proceedings.

Reversed.

BISSELL, J., having been of counsel, not sitting.

THE DENVER, TEXAS & FORT WORTH RAILROAD COMPANY, PLAINTIFF IN ERROR, v. SMEETON, ADM'X, DEFENDANT IN ERROR.

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1. GARNISHMENT—PROOF.

A creditor who attempts, by garnishment, to enforce an alleged liability of one who owes his debtor, must show by satisfactory proof that the garnishee is indebted to the judgment debtor.

2. BURDEN OF PROOF.

When issue is joined upon the garnishee's indebtedness, the burden of proof is upon the attaching creditor.

3. ASSIGNMENT OF FUTURE EARNINGS.

An employee having assigned his earnings or wages for a time to come, and his employer having accepted the assignment, the employer's liability is to the assignee, and garnishment cannot be maintained against him by a creditor of the assignor.

Error to the County Court of Arapahoe County.

Messrs. WELLS, MCNEAL & TAYLOR, for plaintiff in error.

No appearance for defendant in error.

BISSELL, J., delivered the opinion of the court.

By proceedings in garnishment Mrs. Smeeton, the defendant in error, attempted to recover of the Railroad Company a debt which she claimed was due her from James A. Sem-

ple. Semple's indebtedness was not very clearly established, but for the purposes of this decision it will be assumed that he was a judgment debtor, and that the proceedings anterior to the rendition of judgment against the garnishee were regular, and sufficiently established. The judgment creditor cannot recover even with this concession. The creditor who attempts to enforce the alleged liability of one who owes his debtor by the aid of this process must show by sufficient and satisfactory proof that the garnishee is obligated. The cases are in harmony upon this proposition. *U. P. Railway v. Gibson*, 15 Colo. 299.

There was no effort on the part of the attaching creditor to bring her case within this settled rule of law. The Railroad Company denied its indebtedness, and this cast the burden of proving the debt, if any existed, on the creditor. No evidence was offered which disclosed the relations between Semple and the Railroad Company. There was no attempt to show the employment of Semple, the contract under which he was hired, the wages he received, or the time he had been employed. Without proof covering these several propositions, judgment could not be entered against the company. None of them were embraced in the evidence and the recovery cannot be upheld.

In addition to this difficulty there was an equally insuperable obstacle to the plaintiff's recovery. Prior to the time that the writ was served on the corporation, Semple had assigned his wages for the month of September to a third person for a valuable consideration paid to him at the time of the transfer. The company accepted the assignment, and thereafter were only liable to the assignee for whatever might become due to Semple during that time. There is no rule of law which inhibits this proceeding. All of a debtor's tangible property save what may be exempt from execution is liable to be seized in satisfaction of his debts. His labor is not equally available to the creditor for the purposes of satisfaction. He may sell it, or give it away, or dispose of it in such manner as he pleases, and if the transaction in-

fringes no established legal principle the creditor is remediless. *Abbey v. Deyo*, 44 N. Y. 343; *Rush v. Vought*, 55 Pa. State, 437.

If the laborer sees fit to sell his wages for a year for a fixed consideration which the employer is willing to advance to him at the commencement of the hiring, there is no method by which the creditor can attach that labor unless he is able to reach the tangible results which have passed into the possession of the debtor himself. On principle there seems to be no good reason, if this be true, why his right to wages may not be assigned for a valuable consideration then paid, providing the purchaser is willing to take his chances upon the completion of his contract, and the employer is willing to accept the assignment, and agree to pay the assignee whatever may be earned during the continuance of the agreement.

These considerations demonstrate the error into which the court fell in rendering judgment for the attaching creditor. The case must be reversed and remanded.

Reversed.

MOWBRAY, PLAINTIFF IN ERROR, v. THE DENVER & RIO GRANDE RAILROAD COMPANY, DEFENDANT IN ERROR.

1. ORDER SUSTAINING DEMURRER IS NOT A FINAL JUDGMENT.

An order sustaining a demurrer is not a final judgment from which an appeal can be taken, or to which a writ of error can be prosecuted.

2. WRIT OF ERROR, WHEN DISMISSED.

It appearing from the record that a demurrer to the complaint had been sustained, but that no judgment had been entered thereon determining the rights of the parties, the court, on its own motion, dismissed the writ of error.

Error to the District Court of Gunnison County.

THE facts are sufficiently stated in the opinion of the court.

Mr. DEXTER T. SAPP, for plaintiff in error.

Messrs. WOLCOTT & VAILE, for defendant in error.

BISSELL, J., delivered the opinion of the court.

For some years Mowbray, the plaintiff in error, was the owner of some land in Gunnison county contiguous to the Gunnison river. In 1881 he conveyed to the Denver & Rio Grande Railroad for track purposes a strip of land along the banks of the stream. In the construction of its road the company made quite an extensive fill, which shut off the low lands belonging to Mowbray from the line of the stream. Much of the land which belonged to plaintiff was bottom land, and situate below a very considerable mesa which formed one of its boundaries. The property was not far from the range of mountains, and naturally subject to periodical overflows from the melting of the snows in the spring. High waters had dug for themselves numerous water ways through which the surplus was wont to discharge itself, and find its way into the river below. When the road was built it shut off these gulches and forced the water down along the embankment. To protect it the company was compelled to cut or construct culverts and water ways. The result was that the high waters flowed through these sluices or culverts, and were discharged broadcast over these lands, carrying in their course large quantities of sand, small stones and débris, to Mowbray's great damage. According to the complaint, some time in 1884 the railway company passed into the hands of a receiver, W. S. Jackson, during whose administration the acts complained of were done. Afterwards, and in the foreclosure suit in which the receiver was appointed, a sale was made of the property of the corporation and it passed, with all of its appurtenances, to a new corporation called The Denver & Rio Grande Railroad Company. The plaintiff endeavored to charge the railroad company with the responsibility for the acts of the receiver, on the basis of the decree of foreclosure under which the latter

corporation took title. It might be necessary to construe that decree as well as to settle the right to recover, which is disputed on another basis, if the case had been brought here in such a way as to call for the adjudication. This has not been done, and the case will be disposed of on a very narrow proposition.

The company demurred to the complaint and the demurrer was sustained. Neither from the abstract, nor from the record, does it appear that any judgment was ever entered after the demurrer was sustained, nor on the ruling made to that end. The only thing resembling a judgment appearing in either is the following: "Now on this day the court having heretofore heard and taken under advisement the demurrer of the defendant herein to the amended complaint of plaintiff, and now having considered said demurrer and being fully advised in the premises, it is ordered that said demurrer be and the same is hereby sustained, and the plaintiff by his counsel thereupon elected to stand by his complaint and excepted to the ruling of the court in sustaining said demurrer, and upon application four months are allowed plaintiff in which to file bill of exceptions and bond, fixed in the sum of \$250, to be approved by the clerk." No appeal can be taken or writ of error prosecuted except to a final judgment. This is true under the statutes of the state, and under the law as it has always existed. This is so well settled by an unbroken series of adjudications, both here and elsewhere; that authorities need scarcely be cited in support of the proposition. This court had occasion to apply the rule at the present term in the case of *J. J. Hagerman et al. v. Charles J. Moore*, ante, p. 83. It would not be useful to repeat the law, or cite the authorities which are contained in that opinion. It is enough to say that this entry is neither in form nor in substance such a final judgment as will sustain the right to a writ of error.

Under these circumstances the plaintiff in error is entitled to no review of the various errors which he has assigned. The appeal will be dismissed.

Dismissed.

THE PEOPLE, PLAINTIFF IN ERROR, v. TYNON ET AL.,
DEFENDANTS IN ERROR.

2	131
14	105

1. CANCELLATION OF DEEDS, WHEN NOT DECREED.

The complaint showed that the state had held the fee to a portion of a certain "school section," that it had been leased to D. who transferred the leasehold interest to B., by whom valuable improvements were made upon the premises. That defendant T. applied to the land board to purchase the premises, and, in his application, made many false representations as to the value of the improvements, the condition of the premises and their abandonment. That, without an appraisement of the improvements, the land was patented to him, he paying to the board for the benefit of the owner of the improvements, (in addition to the purchase price) \$150, the amount he represented their value to be. The relief demanded was the cancellation of the patent to T. and various mesne conveyances by him and his grantees;—to the end, apparently, that the board and T. might be compelled to protect B. in his improvements and secure the payment of their value: *Held*, that no cause of action was stated in favor of the people.

2. APPRAISEMENT IS NOT A CONDITION PRECEDENT TO RIGHT TO SELL.

An appraisement of the improvements of a lessee upon school land and a deposit of a receipt of the lessee showing payment by the purchaser of the value of the improvements, is not a condition precedent to the power of the land board to complete the sale. Such provisions are for the benefit of the lessee, and do not constitute limitations upon the power of the board.

Error to the District Court of Jefferson County.

Mr. S. W. JONES, attorney general, for plaintiff in error.

Mr. H. RIDDELL and Messrs. THOMAS & THOMAS, of counsel.

Messrs. PATTERSON & THOMAS, for defendants in error.

BISSELL, J. delivered the opinion of the court.

For many years the state of Colorado held the fee to that portion of section 36, township 2, in the county of Jefferson,

which is involved in this litigation. In 1883, while the state owned the property, the land board leased it to one Eliza M. Dow for the term of five years. This leasehold interest was subsequently transferred to one James E. Baker, who held it at the time of the various acts complained of. In May, 1887, during Baker's occupancy, the defendant in error, James Tynon, applied to the board to offer the premises for sale. The board entertained the application, sold the property, and issued a patent for it to Tynon. The proceedings antedating the issue of the patent in so far as they concern the statutory steps which must precede the sale, are not assailed for any irregularity, except as to what was done about the improvements on the premises. It will be assumed then for the purposes of the decision, the board did everything which the statute requires to make the sale regular, unless they should have done some other thing respecting the improvements which may in some manner impeach the validity of their action. It will be shown that this is not true. Since the case comes here on error to a judgment sustaining a demurrer to the bill, the averments on this subject must be taken to be accurate. When Tynon applied to the board to sell the premises he made divers representations about the property; that it had been abandoned; that he was unable to learn the whereabouts of the claimant; that the improvements on the land were in a very dilapidated condition and of no greater value than one hundred and fifty dollars. The falsity of these representations is alleged, the improvements are said to be worth upwards of \$1,000, and it is charged that Tynon concocted a scheme to obtain title to the property without compensating the lessee in possession for what he had put on the land. It is charged that there was no appraisement of the improvements on the property, and that the sale was made and the patent issued, after Tynon had paid into the board for the benefit of the owner what he claimed was their value, to wit, \$150. He did this, and the board accepted it, without calling on him to produce the receipt which the statute requires him to deposit with the board to show that

the holder of the leasehold interest has been protected. There is no other alleged defect in the proceedings, and this is the only basis of the bill save what is predicated upon Tynon's alleged representations to the board concerning the value of the property. This will be discussed later on.

The demurrer was properly sustained. The complaint contains no cause of action on which the State is entitled to any relief. The principal contention on behalf of the people, that an appraisement of the improvements and a deposit of the receipt of the lessee and owner for the amount which that paper would show the purchaser had paid, was a condition precedent, and operative as a limitation upon the power of the board to complete the sale and transfer the title, is not well founded. The statutory provisions relating to these matters were evidently enacted to protect persons who had occupied the premises as lessees prior to the sale. They were not designed to control, or in any wise limit, the power of the board with respect to the disposition of the property. Provisions of this description can never, on any proper principle of statutory construction, be taken as a limitation upon the general power given to boards to sell property, unless they are contained in the sections of the act granting the power, and inserted therein as limitations, or unless the provisions relating to the matter either expressly, or by necessary implication, restrict the general right conferred. We find nothing in the provisions of the statute which warrant any such construction, or which necessarily imply a restriction upon the power of the board to act in the matter. It is wholly unnecessary to determine what remedy the lessee may have either as against the purchaser or the board. It is enough to say that the board exercised their power to sell the property according to the statute, and that the issue of the patent raises the presumption that all the steps which must precede the issue have been regularly and legally taken.

The plaintiff charged no such representations as under the law are essential to entitle a plaintiff to relief. The bill

charges that prior to the sale he stated and represented to the board that the property was of no greater value than \$12.00 per acre. It is said that the board, acting upon this representation, placed this as the minimum price, and proceeded to sell on that basis. Tynon succeeded in purchasing the property at this figure, while the value, according to the complaint, largely exceeded this sum and was not less than \$25.00 per acre. Substantially this is what the complaint contains as matters of fact upon which to predicate the claim for relief for the fraud practiced in inducing the board to sell at an unfair price. What are called misrepresentations are simply statements of opinion as to the value of the property, considered generally with reference to its market price, and on which there might be wide differences of opinion. It is a matter about which the vendor has as full and ample knowledge and opportunity for information as are possessed by the vendee. They did not amount, taken with the most liberal intendment and broad significance, to anything approaching a warranty, and in no manner were brought within the scope of the well-settled law on this subject.

Without reference to the insufficiency of the averments of the bill, it sought no relief which a court of equity could properly grant. What the plaintiff asked was the cancellation of the patent and the various mesne conveyances executed by Tynon and his grantees. These transfers are said to have been voluntary, and without a valuable consideration. The state would be thus reinvested with the legal title, subject to the obligation, if any, arising from the antecedent sale to Tynon. In other words, the state does not seek to set aside the sale which they made, but simply attempts to obtain a cancellation of the conveyance or patent, in order, apparently, to compel the board and Tynon to take such action as they believe is essential under the statute to protect the lessee in his improvements, and to secure to Baker their value. There was no allegation broad enough to warrant the court to set aside the sale, nor did the pleader ask that

this be done. The sole object of the proceeding was to set aside the conveyance, leaving the sale to stand. Manifestly no such decree could be obtained without averments charging that the instrument in some one or more particulars failed to express the agreement and contract of the parties, or was too broad, or restricted, in the terms of its grant, or contained some covenant, or condition, which would operate inequitably, either against the grantor, or in favor of the grantee. The complaint is barren of any allegations of this description. Since the People did not seek to set aside the sale, and alleged nothing which warranted an attack upon the instrument, no judgment could be rendered in favor of the state.

The complaint stated no cause of action, and the judgment which sustained a demurrer to it was properly entered and must be affirmed.

Affirmed.

**McLAUGHLIN ET AL., APPELLANTS, v. THOMPSON,
APPELLEE.**

2	135
8	547

1. PROSPECTING CONTRACT—INTEREST ACQUIRED.

Two parties entered into an agreement to do prospecting work which contemplated a joint prosecution of the enterprise until a valid location was made. One quit the work before the discovery of mineral and the other carried it on until a discovery and a valid location was made. *Held*, that no interest in the property vested in him who had retired, unless he had provided therefor by an agreement with the discoverer.

2. EVIDENCE OF FACTS, NOT ADMISSIBLE WITHOUT PLEADING.

Evidence of facts not pleaded is not admissible, and if admitted will not support a decree.

3. LACHES.

A delay of seven years to bring an appropriate action to recover his interest in a mining claim is an equitable bar to an action, where the plaintiff had failed to contribute labor or money to the enterprise, even if the discovery was made by one with whom he had a contract giving him such interest.

4. SAME.

Reasonable diligence is always necessary to move a court of equity. The strongest equity may be forfeited by laches or abandoned by acquiescence.

Appeal from the District Court of Pitkin County.

THE facts are fully stated in the opinion of the court.

Messrs. WILSON & STIMSON, Mr. CLINTON REED, Mr. CHAS. S. THOMAS and Messrs. BRYANT & LEE, for the appellants.

No appearance for the appellee.

BISSELL, J., delivered the opinion of the court.

There is no appearance for the appellee. His cause is without equity; and he could not have successfully supported the decree, though judgment passed in his favor. In the latter part of November, 1880, Thompson and James McLaughlin started prospecting work on Smuggler mountain on a piece of ground which they named the Jay Gould. The agreement contemplated, although it was not thus directly specified, that they should prosecute the work until they could make a valid location. It will be well to note here two allegations in the complaint, one of which may be said to be supported by the proof, and the other to be wholly variant therefrom. The first is, that Thompson was to assist in doing the "discovery work" on the location. Just the extent to which the pleader intended to go by that averment is not very manifest. It is palpably true under the mining statutes that work properly within that description must be continued until there is uncovered a vein or deposit of mineral. It is not an unfair construction of the pleading to take the allegation as intended to be broad enough to embrace whatever under the mining statutes would be included in this term. Under this construction, then, the plaintiff averred that he

and McLaughlin agreed to sink the discovery shaft to mineral and thereby make a valid location. This allegation seems to be fairly within the purview of Thompson's own testimony, and to be substantially supported by the evidence. There is another averment about which so much cannot be said. Generally it states that by the terms of the agreement McLaughlin was to do Thompson's share of the assessment work until he should dispose of his interest. This is totally unsupported by the testimony. It will be observed that this part of the alleged agreement does not necessarily exclude the idea that Thompson remained obligated to do his part of that discovery work which must precede a valid location. This much he is bound to do by the contract as he states it, and by the terms of it according to his own evidence. This is an important consideration, on the hypothesis which will be subsequently stated, that there was an absolute failure to acquire any title which McLaughlin was bound to protect, even under the agreement to do the annual labor, had that part of the contract been sustained by sufficient proof. The work was continued on the claim until about election time in November, when Thompson left Aspen and went to Leadville. At this time the discovery shaft had been sunk some distance in the wash, probably somewhere between 25 and 40 feet. At this time Thompson ceased to do work, or to contribute to the expense of it, and this situation gives rise to one of the controversies in the case. To overcome the very apparent legal difficulty respecting his title, he testified at the trial that the agreement between him and McLaughlin was, that McLaughlin should take up the work at the point which he had reached when the contract was made, and sink the shaft to mineral for a half interest in that very shadowy thing, a mining location without any discovery. Under the pleadings he was not entitled to make proof of any such agreement. He had not averred it and he should not have been allowed to prove it. There was no application made to amend the complaint to correspond with the proof, and the case stands with a decree entered upon testimony which could

not have been legitimately offered under the pleadings. But the case in this aspect was not so supported by testimony as to entitle the plaintiff to a decree. It was directly disputed by the defendant McLaughlin, whose denial was supported by the whole conduct of the plaintiff. It is probably true that this court would be indisposed, in opposition to the finding of the court in regard to the facts, to disturb the decree because it was not in its judgment supported by the evidence. Since the cause must be reversed on other grounds, the error committed in rendering a decree upon evidence which contradicted the case as the plaintiff laid it, justifies the court in stating that in its judgment this part of the plaintiff's contention is entirely unsupported. But for this reluctance to disturb the findings of a trial court upon the evidence, the reversal would be put upon this naked proposition, viz.: That at the time Thompson quit work on the claim in November, 1880, there had been no discovery of mineral, and since he failed to continue the prosecution of his discovery work to mineral, or to contribute thereto, no subsequent discovery and valid location by the labor of his original partner, without contribution from him, or some agreement with regard to it, could enure to his benefit. It is a very common notion among prospectors in this country, that if they sink a shaft, which they call a discovery shaft, to a depth of more than ten feet, and put up their stakes, they acquire thereby some sort of an interest in the public domain, although within the limits of their shaft or cut, there may be no indications whatsoever of a vein or mineral deposit, and work has ceased. Whatever may be the comity in respect of this matter among miners and prospectors, as a matter of law such a location is absolutely worthless for any purpose. It is equally true that if two men enter into a prospecting agreement which provides for their joint prosecution of the labor, in law this agreement will be taken to include the continuance of the work until a valid location is made on a legal discovery. Should one of the prospectors quit the work, and the other one continue until he finds a vein, the reward is his, and in

it the laggard will have no interest, unless he has provided therefor by an agreement with the diligent partner.

Since this position is predicated upon a disagreement with the trial court as to the evidence, the judgment will not be rested solely on this proposition. There is another principle of equity jurisprudence which is equally conclusive upon the plaintiff's rights. The doctrine of laches and its consequences is as well established as any other rule in equity. It is not often that a case comes before a court which so emphatically demands the application of the principle as the one under consideration. Thompson quit work early in November, 1880. He returned to Aspen in the spring of 1881 and remained through the summer. Before he got back, McLaughlin, who had continued the work during his absence, completed the location and filed his location certificate. During Thompson's stay McLaughlin was engaged in sinking the shaft. The date of the actual finding of mineral is not very clear. At all events the location certificate was on record, and did not contain the name of Richard Thompson. McLaughlin carried on the work in conjunction with Markell while Thompson was in Aspen. The shaft was sunk upwards of one hundred feet, and a drift of about fifty feet was run from the bottom of it, and in many ways there were indications of a very vigorous prosecution of the enterprise, and the expenditure of considerable money on the part of those in possession. Thompson paid no attention to it, manifested no interest in the matter, made no assertion of any claim or right with respect to the property, and in many ways failed to do those things which any miner would have done if he thought he still retained an interest in the claim. In the fall of 1881 he left Aspen and did not return until July, 1888. During all this time he gave no heed to the property, paid no part of the expenses of the location and development, and contributed nothing whatever towards the annual labor required by the mining statutes. It is true that in his complaint he sought to avoid the great force of this neglect by an averment which put the

burden of doing the entire work on McLaughlin. He did not prove it, nor did he offer any evidence whatever to support this allegation. This fact may then be taken to the extent of its fullest significance as bearing upon the matter of the laches. By the joint efforts of McLaughlin and Markell the location seems to have been developed by the discovery of mineral into a valid mining claim. They applied for a patent in 1883 and obtained a receiver's receipt. These proceedings did not stir Thompson to the assertion of his rights and he did nothing until he filed this bill in September, 1888, for the specific performance of his alleged contract. There were sundry complications about the title, springing from a transfer which had been made by McLaughlin to Ottawa Brown. Nothing will be gained by either stating or discussing the effect of the conveyance, or the interest acquired by it, since the general finding will leave her rights and those of McLaughlin to be settled *inter partes*.

Reasonable diligence is always necessary to incite the activity of a court of equity. "The strongest equity may be forfeited by laches or abandoned by acquiescence." Whenever a party desires to enforce an equitable interest in property so fluctuating and uncertain in value as a mining claim, he must be careful to avoid an unreasonable delay. The true doctrine in these cases was very fully and accurately expressed in an able opinion by the present Chief Justice of the supreme court, and re-announced in the latter opinion of *De Mares v. Gilpin, infra*. It need not be restated nor would it be profitable to discuss the reasons supporting the principle. The facts of the present controversy compel a rigid and unhesitating application of the rule. Thompson slept upon his rights for such a length of time that he cannot be permitted to come into a court of equity and ask a decree: *Great West Mining Co. v. Woodmas, of Alston Mining Co.*, 14 Colo. 90; *De Mares v. Gilpin*, 15 Colo. 76.

Any further citation of authorities on this subject would be useless, since these two cases fully express the law on this

subject. The plaintiff may not recover, either under the case as he made it, or under the proofs concerning his delay.

The case is reversed and remanded, with directions to the court below to enter a decree in conformity with this opinion.

Reversed.

SULLIVAN, APPELLANT, v. LEER, APPELLEE.

| 2 141 |
| 5 194 |

1. SPECIFIC PERFORMANCE, WHEN DECREED.

Specific performance of a contract to convey real estate will be decreed only when the contract is clear and is established beyond question, and even then it rests largely in the discretion of the court.

2. SAME—ADEQUACY OF REMEDY AT LAW.

A court of chancery has jurisdiction to decree the performance of a contract to convey real estate, regardless of the adequacy of an action at law.

3. AGENCY—EVIDENCE OF AUTHORITY.

To bind the principal to execute a conveyance of real estate, the authority of the agent to make the sale must be established. Such authority need not be under seal—need not be contained in a single instrument—may be deduced from letters and telegrams, but it is indispensable that the agency and authority be established.

Appeal from the District Court of Arapahoe County.

THE facts are fully stated in the opinion of the court.

Mr. C. D. MAY, for appellant.

Mr. J. A. BENTLEY, for appellee.

REED, J., delivered the opinion of the court.

Appellee, a nonresident, was the owner of a property on Champa street in the city of Denver. One W. H. Clise was, and for some time had been, her agent to collect rents and attend to the property. From some time in 1887 to April 27th, 1889, appellee and her agent, Clise, had had in-

definite correspondence in regard to the sale of the property. On the last date the following contract or memorandum of sale was made, executed and delivered by Clise to appellant:—

“Received this twenty-seventh day of April, A. D. 1889, from A. B. Sullivan, of the city of Denver, Arapahoe county, Colorado, the sum of one thousand (\$1,000) dollars in part payment for the purchase of lots seven (7) and eight (8), block one hundred and thirty-one (131), East Denver, Arapahoe county, Colorado, which the undersigned agrees to sell and the said A. B. Sullivan agrees to buy on the following terms, viz.:—The total purchase price for said lots is the sum of seventeen thousand (\$17,000) dollars, of which one thousand (\$1,000) dollars is paid down on signing thereof, and the balance, sixteen thousand (\$16,000) dollars, is to be paid when a good and sufficient warranty deed, properly executed, shall be delivered, title to be perfect and free from incumbrances, and a complete abstract of title, showing good title, to be furnished by the undersigned; the undersigned agrees to show good title and deliver deed as aforesaid within ten days.

“J. M. M. LEER.

“By W. H. CLISE, Agent.”

On the 3d of May appellee arrived in Denver, and in a day or two refused to make the sale under the contract, refused to receive the \$1,000 from Clise, and on tender being made refused to receive the remaining \$16,000, and to convey the property.

This was a suit to compel specific performance.

In every case where suit is brought to enforce the specific performance of a contract, the contract must be clear and established beyond question, and even then the granting or refusing of it rests largely in the discretion of the court. No general rule can be or has been adopted.

It is said in Story's Eq. Juris., § 742:—“The exercise of the whole branch of equity jurisprudence respecting the rescission and specific performance of contracts, is not a

matter of right in either party, but it is a matter of discretion in the court * * * which withholds or grants relief according to the circumstances of each particular case." And see *City of London v. Nash*, 1 Ves. 13; *Underwood v. Hitchcox*, 1 Ves. 279; *Clowes v. Higginson*, 1 V. & B. 527; *St. John v. Benedict*, 6 John. (N. Y.) Chy. 111.

It was formerly universally held that specific performance would not be decreed where the remedy at law was adequate and a party could be compensated in damages. See Fry on Spec. Perform., §§ 10, 12; *Dhetegot v. London Assn. Co.*, 1 Atkyns, 547; *Rose v. Clarke*, 1 Young & Coll. 534; *Adair v. Winchester*, 7 Gill & J. 114; *Redmond v. Dickerson*, 1 Stock. (N. J.) 507; *Bonebright v. Pease*, 3 Mich. 318.

But in later years courts have departed from the rule as stated, and where land is the subject of the controversy the jurisdiction of a court of chancery to decree specific performance appears to be well established, regardless of the adequacy of an action at law. See 3 Pom. Eq. Juris., § 1402, and cases cited.

But it still rests in the discretion of the court, controlled by fixed rules; one of which is, that the contract must be in its nature and incidents entirely unobjectionable. In this instance there was no abuse of the discretion, and the court was warranted in refusing the decree and relegating the plaintiff to an action at law.

Aside from these considerations, the appointment of Clise as agent to sell, and his authority to sell and bind appellee to convey, were not satisfactorily established. The court may have found that no competent agency was created, and in that conclusion this court can agree; and that being a fundamental defect, effectually prevented appellant from obtaining any redress from appellee in equity or at law, regardless of the questions discussed above.

The evidence relied upon by the plaintiff to establish the agency was nearly entirely the letters and telegrams of the respective parties running through two years, most of the letters pertaining to accounts and other business matters in

which the question of sale is mentioned incidentally. On July 5, 1887, Clise, in a letter, forwarding rent and statement of account, said, "I have not been able as yet to sell your property. Real estate is always slack during warm weather. I think by fall it will rise again. In the mean time, will do all I can to make sale." Appellee answered August 3, 1887, not referring in any manner to a sale. In a letter of January 21, 1888, from appellee, she asks, "Do you think there will be any chance of my selling the house next spring? How is real estate,—is it dull there now?" Sometime in February, 1888, Clise telegraphed an offer of \$15,000, \$3,000 cash, balance time, which was declined, and the following sent by appellee to Clise: "Offer only for \$16,000, and one half down." In a letter from Clise to appellee of March 5, 1888, he says at the close of an accounting: "Hope to sell your house one of these days. The offer I telegraphed you of \$15,000 was the best offer the party would make." In appellee's answer to Clise of March 15th, she says, *inter alia*: "I am in no particular hurry to sell until I can get my price, and will not wait over two years for payment and require 10 per cent * * *. *If you happen to get a chance to sell, notify me and I will come on. I consider that the best.*" On March 29th, she wrote that she had received a letter in which she was informed the property was worth \$17,000, and adds, "But have decided to wait until I can get \$16,000 cash outside of the loan." The property was encumbered to the extent of \$1,000. On April 9th, Clise wrote, "It may be your property can be sold for \$16,000, but out of it you will have to pay a regular commission. * * * The commission would be at \$16,000, \$462.50, so I would like to know whether to sell or not. During the warm weather real estate will be dull," etc. To which she responded, April 17, 1888, "I don't feel as though I ought to take less than \$16,600, the commission amounts up so. If I wait another year I may get my price. If, however, you can get me \$16,000, outside of the commission, the property is for sale." And on April 21st, he writes, "I note

what you say about the sale of your house and two lots. I will try to sell for the amount you name, \$16,000 net to you. I doubt my ability to sell at that figure." Then nothing occurs in the correspondence in regard to a sale until August 13, 1888, when Clise, incidentally, expresses regret that appellee had not sold at \$16,000 when she could. The next allusion to a sale of any importance occurs in a letter of appellee of March 30, 1889, where she says, "I will be in Denver last of April or first of May—wish you would have a purchaser; think I ought to get \$17,000 for the house, as there is quite a boom in Denver real estate and prices are high this spring." The next is a telegram from Clise of April 20th, where, notwithstanding appellee's letter of a month previous putting the price at \$17,000, and stating that she would be in Denver about that time, he says, "Lot sold for \$16,000 cash. Mailed you deed for signing to-day." To which she replied April 24th, "Wont sell for less than \$17,000—be there May 1st," and on May 3d, the day of her arrival, Clise telegraphed, "Sold property \$17,000 to A. B. Sullivan, Saturday 27th," which she did not get until after the contract was repudiated.

This embraces all the evidence which would tend to establish an agency to bind the principal by the written document. Great latitude was allowed appellant in his attempt. Much of the testimony had no relevancy to the transaction. The only evidence that can be considered is first letter of appellee of March 30th. By it no power to sell for \$17,000 is given nor is a definite price fixed,—says, "Think I ought to get \$17,000,"—at the same time informs him that she will be in Denver. "Wish you would have a purchaser."

In the telegram she says she wont sell for less than \$17,000, "be there May 1st." This fixes no price, confers no authority to sell, but keeps it in abeyance until her arrival. Why, on the eve of her arrival, it becomes necessary to sell and close the sale by a written agreement is left to conjecture. No reason or exigency was shown. Elaborate and carefully

prepared briefs and arguments are filed by appellant upon the different propositions discussed.

We can find no appointment of Clise as an agent to sell, either generally, at his own discretion, or at a fixed price—no authority to make a sale. Taking all the miscellaneous evidence introduced to establish the agency and we can find nothing in the way of an appointment or authorization. To bind the principal in writing or by parol to execute a conveyance, the authority of the agent to make the sale must be established. Such an authority need not be under seal—need not be contained in a single instrument—may be deduced from letters or telegrams, but it is indispensable that the agency and authority be established and a clear and unequivocal appointment of the agent shown. In this case the agent was not ordered or authorized to make and conclude a sale at any price or upon any terms, whatever. The power to adopt or reject any proposition was retained by the principal and postponed until her arrival; hence, the authority of a properly constituted agent to execute a writing of the character shown, is not involved.

The decree refusing a decree for specific performance and dismissing the bill will be affirmed.

Affirmed.

BOHM, APPELLANT, v. HOFFER, APPELLEE.

1. DECEDENT'S DEBT, WHEN CHARGEABLE TO WIDOW.

A widow of a deceased debtor can be made liable for his debt only by an assumption thereof and an absolute promise, upon a consideration, to pay it, or by reason of her succeeding to the estate of her husband and failure to pay the debt.

2. STATUTE OF FRAUDS.

Mrs. B., who on account of the illness of her husband was attending to his business, wrote to his creditor the following letter:—"Mr. Hoffer. You will find enclosed fifty dollars, all I can raise at present. I hope to be able to give you more very soon. Please give me credit,

and oblige. Mr. Bohm is home sick. Mary Bohm." Held, that the letter was insufficient, under the statute of frauds, to bind her to the payment of her husband's debt.

Appeal from the County Court of Arapahoe County.

THE case is fully stated in the opinion of the court.

Mr. JOHN L. JEROME, for appellant.

Mr. E. P. HARMAN, for appellee.

REED, J., delivered the opinion of the court.

John G. Hoffer in 1885, and some time previous, was conducting the business of a retail butcher in the city of Denver as agent of a sister-in-law, the appellee.

Prior to March, 1885, Charles Bohm, husband of Mary Bohm, was living and the head of a family of four or five persons. He had been dealing with appellee with an open unsettled account running from January 1, 1883. On the 6th of March, Charles Bohm was sick, and the wife sent to appellee \$50, with the following note:

"Mr. Hoffer.—You will please find enclosed fifty dollars, all I can raise at present. I hope to be able to give you more very soon. Please give me credit, and oblige,

"MARY BOHM.

"Mr. Bohm is home sick:"

The \$50 was credited on the account of Charles Bohm. Shortly after, the date not shown, probably about May 1st, Mr. Bohm died. Dealing was continued with appellee until May 1st, when there was an unpaid balance on the account of Charles Bohm of \$195.23.

This claim does not appear to have been filed against the estate of Charles Bohm, nor any attempt made to collect it. About two years after the death of the husband, the wife died, and subsequently the claim was filed against her estate and allowed—remaining unpaid, this suit was brought. A trial was had and judgment for \$195.23.

The judgment cannot be sustained. It was clearly the debt of Charles Bohm, and should, if enforced at all, have been collected from his estate. She could only be made liable by an assumption of the debt and an absolute promise to pay it, or by reason of her succeeding to the estate of the husband and failing to pay the debts. It was not shown that the widow succeeded to any property of the husband, consequently, we must infer that the judgment was based upon a supposed assumption of the debt, and a promise to pay by Mrs. Bohm, predicated upon the note above, written by the wife while the husband was sick. That is insufficient. It is true she writes of it as her own individual matter, but in reference to a claim not against her, but the husband to whose business she was attending during his illness. It is not shown that she at that time was doing any business or had any property, or that she had in any way assumed the debt, or had been required to, nor is any consideration shown to have passed. An assumption of it, to be obligatory, must have recognized it as having been the former debt of the husband, and, as such, a promise to pay it upon an expressed consideration. The hasty note is insufficient under the statute of frauds. There is nothing in it to connect the wife with the transactions of the husband and appellee. For all that appears upon the face of it, it might have been in regard to another matter—a transaction of her own.

There being no other evidence to charge the estate, the judgment must be reversed and cause remanded.

Reversed.

WALKER, APPELLANT, v. POGUE ET AL., APPELLEES.

2	149
23c	108
2	149
14	870
2	149
15	507

1. ACTION TO QUIET TITLE.

The Civil Code, sec. 255, which provides for action by one in possession of land by himself or tenant "against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim," does not authorize an action by one who has conveyed the legal title to the land, but retains possession thereof.

2. PLEADING.

A complaint to rescind a conveyance on the ground that the stock of goods taken in consideration therefor was not as represented, which shows that the goods were delivered to the plaintiff as agreed, but fails to state when the fraud was discovered, or that the goods were returned or tendered to the defendant, is bad on general demurrer.

3. RESCISSION OF DEED FOR FRAUD—LIMITATION.

A complaint filed in July, 1887, to rescind a deed made in September, 1883, on the ground of fraud, which does not show when the fraud was discovered, is barred by Gen. Stats., sec. 2174, which provides that "Bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards."

Appeal from the District Court of Arapahoe County.

APPELLANT was plaintiff below. The suit was brought for equitable relief on the following facts alleged in the complaint:—

That on September 3, 1883, plaintiff was the owner of certain lots in the city of Denver and in possession of them, and at the time of bringing suit was still in possession, never having resigned it. That the defendants claim an estate or interest in the property adverse to plaintiff. That the defendants have no right, title or interest whatever in the property. That on the 3d day of September, 1883, Pogue represented to plaintiff that he was the owner of a stock of hardware stored in the city of Richmond, state of Indiana, of a good merchantable quality, manufactured from good material, and of the quality then in use, worth \$15,000, which he wished to exchange for the lots. That he gave plaintiff an

inventory of the goods. That the plaintiff, relying upon such statements, made the exchange, and on the date mentioned conveyed the property by deed to Pogue. That on some blank date the goods were shipped to Denver "*and were delivered to plaintiff in consideration of the conveyance aforesaid.*" That all the representations of Pogue were false and fraudulent. That the goods were not of good quality, were not merchantable, were of poor material, and that many of the goods contained in the inventory were missing. That he discovered these facts on the 11th of October, 1883, which, though not definitely stated, appears to have been some time after the delivery and acceptance of the stock. That on the date last mentioned, he notified Pogue and Bradbury "that the contract was rescinded and then and there offered to Pogue to return the hardware, and demanded a reconveyance of said * * * lots * * * and that said Pogue refused to receive the said stock of goods and make said conveyance." That afterwards, on the 10th of November, 1883, Pogue conveyed the property to W. H. Bradbury; that no consideration passed. That Bradbury had full knowledge of all the facts and circumstances. That Bradbury was the agent of Pogue and assisted him in perpetrating the fraud, etc. That in January, 1884, Bradbury conveyed two of the lots to the Randolph Land & Stock Company; that such conveyance was without consideration, with full knowledge of the facts and void.

Prayer that the deeds from plaintiff to Pogue, from Pogue to Bradbury, and from Bradbury to the Randolph Company, be declared fraudulent and void, and that each of the parties be required to convey to the plaintiff, and for an injunction, etc.

A demurrer was filed to the complaint, first, that the complaint did not state facts sufficient to constitute a cause of action; second, that the complaint showed upon its face that it was a bill for relief on the ground of fraud, and that the alleged fraud was discovered on the 11th of October, 1883, and that the bill of complaint was not filed until July 27,

1887, more than three years after the discovery of the fraud. The demurrer was sustained and an appeal taken.

Mr. PLATT ROGERS and Messrs. ROSS & DEWEESE, for appellant.

Messrs. WOLCOTT & VAILE, for appellees.

REED, J., after stating the facts delivered the opinion of the court.

Two questions are presented for determination.

First.—Does the complaint state facts sufficient to constitute a cause of action?

Second.—Was the suit barred by the statute of limitations?

Preliminary to the discussion of either question it appears necessary to determine the character of the suit. Appellant at the outset declares it to be one brought under chap. 22, Code of 1887, of Actions to Quiet Title, and the brief and argument are based upon that supposition. Appellees regard it as a suit to rescind a contract because of fraud in obtaining the title.

By sec. 255 of the Civil Code it is provided, "An action may be brought by any person in possession by himself or his tenant, of real property against any person who claims an estate therein *adverse to him for the purpose of determining such adverse claim, estate or interest.*"

The possession of real property is in all cases supposed to follow a conveyance of the legal title unless retained for a given time by contract of the parties. There does not appear, in this case, to have been any contract. What the character of the possession was is not disclosed. Had the property been improved it would probably have been so stated, and the same, had it been in any way actually occupied by appellant. If vacant, constructive possession passed to the grantee by the conveyance. We do not think cases of this

kind were contemplated by the legislature or come within the purview of the statute. To maintain an action the possession must be based upon some title, and asserted upon some legal right to the possession. A wrongful possession illegally retained, by the grantor of real property to which he has conveyed the fee, cannot be regarded as the possession intended by the Code, nor can the grantor, after conveying the legal title, successfully claim that such title is adverse; the possession may be adverse but the title is in privity. The title of the grantee, so far as appears, was the only legal title. What legal title the grantor had, passed by his own conveyance, and could not be regarded as adverse. After the conveyance, the grantor was without title of any kind whatsoever, and a naked, wrongful possession was not sufficient. A title, or claim of title, to be considered *adverse*, must be derived through some other source, or collaterally from the grantor, not directly, and where the conveyance is of the fee.

- It follows that in our view the character of the action is misconceived by the appellant, and that by the allegations of the complaint and the relief asked, it can only be regarded as a suit to compel the rescission of the conveyance on the ground of fraud in obtaining it, or for want of consideration.
- Viewing the case in this light, were the allegations in the complaint sufficient to warrant a court of equity to decree the cancellation of the deeds and reconveyance? Prior to the arrival of the goods in Denver, the grantor could only rely upon the inventory and the representations of Pogue. After their arrival, he had the opportunity, and it became his duty, to either disprove or verify their correctness. Whether he did or did not is not stated. It is not shown at what date the goods arrived, but probably in the early part of September, and it is stated, "The same were delivered to the plaintiff in consideration of the conveyance aforesaid." The delivery, of necessity, involves an acceptance, and the acceptance is clearly inferable from the facts stated, for on October 11th, when he alleges the discovery of the fraud,

they were in plaintiff's possession, and he offered to return them and demanded a reconveyance of the land, and the legal inference must be that he had been in such possession from the time of the arrival and delivery. From the time of the conveyance until the arrival of the goods plaintiff could rely upon, and defendant was responsible for, the representations made; then with the opportunity for examination and verification, the transaction ceased to rest upon the representations, and the maxim *caveat emptor* applies. By an unqualified and unconditional acceptance, he was estopped to deny the correctness of the representations.

In 2 Addison on Con., 995, it is said: "If the defect is patent and can readily be discovered by proper examination at hand, there is no fraudulent concealment."

It is alleged that some time after the delivery and acceptance, an offer to return the goods and demand for the reconveyance of the property was made and refused.

In order to rescind, parties must be placed in *statu quo*, without such result there can be no rescission except by mutual consent. This principle is so universal that no authorities are needed in its support. No rule of equity is more fundamental than that a party must do, or offer to do, equity to entitle him to equitable relief.

It is not shown what became of the goods. The last we hear of them was on October 11, 1883, nearly four years before the institution of the suit; they were then in possession of the plaintiff. There is no showing of what became of them, no offer in the complaint to return, nor account for the proceeds; for all that appears, plaintiff was demanding a reconveyance while retaining the consideration he had received for the property, with no offer to return it.

The court was justified in sustaining the demurrer on the general ground that the complaint did not state facts sufficient to constitute a cause of action.

Sec. 2174, Genl. Stat., p. 672, is: "Bills for relief on the ground of fraud shall be filed within three years after the

discovery by the aggrieved party of the facts constituting such fraud and not afterwards."

Comments upon and construction of the statute are unnecessary. We have shown that in our view of it, it was clearly a bill for relief on the ground of fraud, and such conclusion is plainly established by several unmistakable allegations.

It is said, "That all the representations so made by the defendant, Pogue, regarding said goods, were false and fraudulent, and were known to be such at the time they were made by said defendant, * * * and that said representations were made for the purpose of obtaining possession of said premises without paying a valuable consideration therefor." Language could hardly be more explicit to characterize the nature of the suit. It also appears upon the face of the complaint that the fraud was discovered October 11, 1888; suit was instituted July 27, 1887, three years, nine months and a half afterwards. The suit was barred by the statute of limitations.

Pipe v. Smith, 5 Colo. 146, is directly in point and conclusive of the question, not only of the statutory bar, but that it may be raised by demurrer when it appears upon the face of the bill. See also *Bradbury v. Davis*, 5 Colo. 265; *Bohm v. Bohm*, 9 Colo. 100; *Sublette v. Tinney*, 9 Cal. 424; *Carpenter v. City of Oakland*, 30 Cal. 439.

The judgment sustaining the demurrer must be affirmed.

Affirmed.

MORRIS, PLAINTIFF IN ERROR, v. HANSON, DEFENDANT
IN ERROR.

1. REPLEVIN—INSUFFICIENT OR INFORMAL UNDERTAKING.

The acceptance of an informal or insufficient undertaking, in an action of replevin, must be taken advantage of at the earliest practical opportunity, as such defective undertaking will not deprive the

court of jurisdiction, nor in any way interfere with or void the proceeding.

2. OBJECTIONS—WAIVED.

Failing to take advantage of such defect, and by pleading to the merits, the defendant will be presumed to have waived his objection.

Error to the District Court of Otero County.

Mr. JAMES HOFFMIRE, for plaintiff in error.

Mr. S. A. SHELDON, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

On the 26th day of August, 1889, Andrew Hanson, defendant herein, instituted his action for the recovery of certain personal property of the alleged value of \$200 against plaintiff in error, George Morris. Affidavit and bond was filed and thereafter writ of replevin issued. It appears from the record that the bond was signed by the plaintiff and one surety. On the 4th of September, 1889, Morris filed a motion to dismiss the action for want of sufficient bond, and before hearing of said motion he filed his answer to which the plaintiff replied.

The motion to dismiss was overruled, and the cause was subsequently transferred, on motion for a change of venue, from the county court to the district court. In the latter court defendant renewed the motion to dismiss, and it was there overruled and the cause tried upon its merits, resulting in a judgment in favor of the plaintiff.

It seems, however, that prior to the hearing of the motion to dismiss in the district court the plaintiff secured an additional surety.

Plaintiff seeks to reverse the judgment on the ground that sufficient bond in replevin had not been given at any time, and contends that the subsequent signature of the surety, without notification to the previous surety, was illegal and rendered the bond absolutely void.

The only point raised and discussed is the supposed error of the court in not dismissing the action upon the motion.

We do not think plaintiff in error is in a position to insist upon this contention. If it were error for the court to overrule the motion on the ground of insufficiency of the bond, to reverse the judgment for that reason would in no sense assist the plaintiff in error; if the bond had been signed by many sureties and legal in every sense, no right of action would accrue to the plaintiff in error upon the same. The judgment was against him for the property or its value, to which judgment no exception was reserved nor is the result of the trial complained of.

Absence of bond at the trial would in no way affect the jurisdiction or proceeding of the court. Wells on Replevin, § 393; *Tripp et al. v. Howe*, 45 Vt. 523.

The failure to take the bond, or the acceptance of an informal or insufficient one, must be taken advantage of by the defendant at the earliest practical opportunity, as such defective bond will not deprive the court of jurisdiction, nor in any way interfere with or avoid the proceeding; and by omitting to take advantage of such defect, and by pleading to the merits, the defendant will be presumed to have waived his objection, and will not usually be permitted to assert and take advantage of them afterwards.

It will be observed that after filing the motion to dismiss in this cause and before hearing thereof, the plaintiff answered the complaint. *Kesler v. Haynes et al.*, 6 Wend. 547; Wells on Replevin, § 410; *Parker v. Hall*, 55 Me. 362.

Besides, the plaintiff could have complained of the insufficiency of the bond under the provisions of sections 82 and 84, Civil Code, Session Laws 1887.

By section 82 it is provided that, "A defendant may, within five days after the service of a copy of a writ, give notice to the clerk, that he excepts to the sufficiency of the sureties on plaintiff's undertaking. If he fails to do so within five days after such service, he shall be deemed to have waived all objections to them." * * *

By section 84 it is provided * * * "If at any time pending an action under the provisions of this chapter, it shall appear to the court, or the judge thereof, in which the action is pending that any undertaking given is insufficient or that any surety therein has died or has removed from this state, or is or has become or is likely to become insolvent, said court or the judge thereof in vacation, shall order another and satisfactory undertaking to be given within such time as the court shall direct, notice in writing having been previously given to the adverse party of the intended application for such order. If any person to whom such order shall be directed, shall fail to comply with the terms thereof, the court shall order the return of the property to the adverse party pending the trial."

Here then were two methods by which the defendant below could have secured a bond with ample security to protect any rights he might have in the property. Neither of which he saw proper to pursue, and in view of the fact that the question of sufficiency or insufficiency of the bond was properly brought to the attention of the court by the motion to dismiss, we are warranted in believing that the district court deemed the bond amply sufficient for the protection of the defendant's rights. Besides, it would work no benefit to the defendant for us to reverse the cause even if error had been committed by the trial court.

The judgment must be affirmed.

Affirmed.

THE SIOUX CITY NURSERY ETC. CO., PLAINTIFF IN ERROR,
v. CARLTON, DEFENDANT IN ERROR.

2	157
10	312

1. DEFENSE—FAILURE OF CONSIDERATION.

The defendant in an action on a promissory note may always, while the note remains the property of the payee, avail himself of the defense that it was given without consideration.

2. PRESUMPTION ON REVIEW.

In the absence of the bill of exceptions containing the evidence, the presumption is that the judgment was warranted by the proofs.

Error to the County Court of Otero County.

THE case is stated in the opinion of the court.

Mr. A. F. THOMPSON, for plaintiff in error.

Mr. LUCIUS P. MARSH, for defendant in error.

REED, J., delivered the opinion of the court.

Plaintiff in error was plaintiff below, and brought suit on two promissory notes given for nursery stock. The case being an appeal from a justice of the peace, there were no written pleadings. The notes were put in evidence and the plaintiff rested.

The defendant was sworn and gave testimony and produced eight or ten witnesses, who also testified; but as to what they testified and what the nature of the defense was, we are wholly uninformed. There is no bill of exceptions contained in the transcript sent up. The case was tried to the court and resulted in a judgment of \$100 and costs against the plaintiff for labor, loss of growth of the trees, damages, etc. From this we presume—and it rests entirely in presumption—the suit being between the original parties, that the defense was want of consideration, and that the defendant's judgment against the plaintiff was based upon the breach of some warranty, resulting in damage. Several errors are assigned, but their consideration is impossible for want of data. It is ably urged in argument that the court erred in allowing parol evidence to overcome the absolute agreement to pay, contained in the notes. Judging from the result, we conclude such was not the course pursued, but that the defense was want of consideration, which is always available to a defendant while the note remains the property of the payee.

The legal presumption always being in favor of the regularity and correctness of judgments—with no means of knowing upon what the judgment for damages against the plaintiff was predicated, or what the evidence in support of it was—the presumption must prevail in regard to its validity.

The judgment must be affirmed.

Affirmed.

THE UNION PACIFIC RAILWAY COMPANY, APPELLANT, v.
ARTHUR, APPELLEE.

2 159
3 527

1. CONSTITUTIONAL LAW.

Sec. 2798, Gen. Stats., providing "that every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fire that is set out or caused by operating its line of road, or any part thereof, and such damages may be recovered by the party damaged, by the proper action in any court of competent jurisdiction," *held*, constitutional, under the authority of *U. P. Ry. Co. v. De Busk*, 12 Colo. 296.

2. JURISDICTION.

The judgment of the supreme court holding the constitutionality of the act, remaining authoritative, the question is not open to review in this court.

3. NEGLIGENCE, WHEN NOT REQUIRED TO BE SHOWN.

It is not necessary in an action under this statute to show negligence on part of the railroad company in causing the fire.

4. CONTRIBUTORY NEGLIGENCE.

In such an action the doctrine of contributory negligence cannot be invoked by the defendant.

Appeal from the District Court of Park County.

Messrs. TELLER & ORAHOD, for appellant.

No appearance for appellee.

REED, J., delivered the opinion of the court.

Appellee brought suit for damages caused by fire alleged

to have been set out by an engine of appellant, resulting in the destruction of grass and hay in the stack on the land of appellee through which the road was operated.

The statute under which the action was brought is as follows:—Genl. Stat. § 2798, p. 812.—“That every railroad company operating its line of road or any part thereof within the state shall be liable for all damages by fire, that is set out or caused by operating any such line of road or any part thereof, and such damages may be recovered by the party damaged by the proper action in any court of competent jurisdiction.”

The case was tried in the district court to a jury, resulting in a verdict and judgment against the appellant for \$610, from which this appeal was prosecuted. The case is ably presented by the counsel of appellant, upon two propositions: First, that the statute “is unconstitutional and void, being in violation of the Constitution of Colorado * * * and of the Constitution of the United States * * * in that, *in the form of a money judgment, it deprives persons of property without due process of law.*” Second, that “the plaintiff was guilty of contributory negligence in respect to the stack of hay burned.” Some twenty pages of printed brief and carefully prepared argument are devoted to sustaining the first proposition. The case of the *U. P. Railway v. De Busk*, 12 Colo. 296, is ably reviewed and criticised. The argument was addressed to, and filed in the same court (the supreme court), probably with the view of the overruling or modification of the decision in that case. The case having been transferred by the supreme court to this court, and the opinion in that case, clearly and unequivocally asserting the constitutionality of the law, remaining authoritative, the question is not open to review in this court and will not be discussed.

The statute in question seems to have been based upon the theory that with modern mechanical appliances and due care railroads could be so operated as to render the setting out of fires by locomotives impossible, and that the communicating of fire to adjacent combustible material was to be re-

garded as negligence *per se*, eliminating all questions of negligence or care which were fundamental and controlled the right to recover at common law. Whether such theory was correct, and care and modern mechanical appliances would absolutely prevent and render the escape of fire impossible, we are not informed. If such is the fact there can be no question of the justness of the statute or the wisdom of the legislature in enacting it. The utmost skill and care should be required and all modern, practicable, mechanical devices employed for the protection of property; more especially should this be the case where climatic conditions are such as to greatly enhance the danger, but if on the other hand the absolute control of fire is not within the power of the company or its operators, the statute is, at least, harsh and oppressive. The right to operate a railroad being conferred and a franchise granted, the people of the state have a right to exact all possible care in its management, and by law compel due attention to private rights of persons and property.

By the statute under consideration, the law of control and indemnity for loss has been carried to the very verge of constitutional legislation. By it only two questions are left for determination: first, the origin of the fire; second, the amount of damage. The question of care or negligence in operating the road not being a factor, and there being no law requiring individuals along the line of the road to use any precautions or perform any acts to prevent the occurring of fires, we do not see how, under the circumstances of this case, or under any circumstances where the loss occurs by fire, contributory negligence, on the part of the owner of the land, can be available as a defense.

It is contended that appellee was guilty of contributory negligence; first, in stacking hay too near the track; second, in not protecting it from fire; third, not allowing appellant to protect it. We are at a loss to see how the doctrine of contributory negligence can be invoked as a defense where there is no law requiring precautionary action on the part of

the party damaged, and no question of negligence on the part of the corporation can be made or adjudicated.

It is shown by the evidence that the stack of hay burned was from 120 to 150 yards from the track; that the right of way of appellant was 50 feet in width, 25 feet each way from the center of the track; that the fire caught a few feet outside of the right of way, burned over the intermediate ground, reached the hay and consumed it; hence, the burning could not be chargeable to its proximity—fire was not directly communicated to the hay from the engine. The proximate cause was the ignition of the grass in the immediate vicinity of the track. It is evident the result might have been the same had the distance been a mile.

It is also shown by evidence that appellant's servants had attempted to burn around the stacks to protect them, and had been stopped by appellee. Within the right of way and upon the land under control of the appellant, any precautionary measures were under its control and not only justifiable but praiseworthy. Outside of its lines, such efforts may have been praiseworthy, but not legally justifiable without the consent of the owner. To allow or refuse permission was a matter solely in his discretion, and he could not be chargeable with contributory negligence for refusing to allow an illegal entry and occupation of his land.

In *The Denver, T. & G. R. R. Co. v. De Graff*, recently decided in this court, *ante* p. 42, we had occasion, in an analogous, if not strictly parallel case, to discuss the same statute, and the case of *Railway v. De Busk*, (*supra*,) while following it as to the constitutionality of the statute, we did not indorse the opinion as a whole. We could not say that under an arbitrary statute, where the only facts to be established were the origin of the fire, and damage, that the origin of the fire could be established by *inference*. Such construction would leave a corporation too much at the mercy of designing men, and we held that the origin of the fire should be established like any other important fact, and reversed the judgment mainly for want of sufficient evidence to estab-

lish the origin. In this case, that the fire was communicated by a passing engine appears to have been tacitly conceded or admitted.

It is also contended that the court erred in refusing instructions asked by appellant, and in those given.

The first four instructions asked and refused required the court to direct a verdict for appellant, taking all consideration of questions of fact from the jury, and were very properly refused.

The second refused instruction required the court to instruct the jury that plaintiff could not recover unless negligence was shown on the part of appellant. As already shown, in our construction of the statute, no issue of the kind was involved, and the instruction properly refused. The third, fifth and sixth required the court to submit to the jury questions of contributory negligence on the part of appellee; first, that it was negligence to stack the hay so near the track without protecting it in some manner. Such instruction was not warranted by any evidence in the case. The distance was a safe one as far as direct danger of burning was concerned. The fifth was the same as the third in effect, with the addition that it was the duty of appellee to have burned or plowed a fire guard around the stack, and failing to do so was negligence. This was properly refused. The sixth, the same as the fifth, with the further addition that the appellee was guilty of negligence in not allowing appellant to burn a fire guard around the stacks. This, in our view of the case as above stated, would have been improper and was properly refused.

Under a statute arbitrarily fixing the liability, on proof of damage and that the fire was communicated by operating the road, regardless of the questions of care and negligence, there, of necessity, could be no issue of contributory negligence, no precautions being required by law to be taken by parties to prevent burning. If there was error in the instructions given, it was in submitting to the jury the question of contributory negligence of the appellee at all. In

the sixth and seventh instructions given by the court the question of contributory negligence of appellee is directly submitted to the jury, and they were charged if the property "would not have been destroyed but for that contributory negligence, then plaintiff cannot recover in this action."

The instructions given embraced, in substance, all that was asked by appellant on the question of contributory negligence, and the issue was found against it. In other respects the instructions given appear to have been correct.

The statute having been declared constitutional, and in our view of it, no serious errors having occurred upon the trial, the judgment must be affirmed.

Affirmed.

2	164
2	169
2	171
2	393

**ELLIOTT, PLAINTIFF IN ERROR, v. FIRST NATIONAL BANK,
OF COLORADO SPRINGS, DEFENDANT IN ERROR.**

1. CHATTEL MORTGAGE—DILIGENCE—FRAUD.

The mortgagee of chattels must take possession of the property upon default in payment of the debt. Suffering it to remain in the possession of the mortgagor after maturity is, as against creditors, fraudulent *per se*, and not subject to explanation.

2. PRACTICE.

A failure to serve the defendant in attachment with a copy of the writ can be taken advantage of only by the defendant not served. It cannot be raised collaterally by a third party.

Error to the District Court of Arapahoe County.

ONE F. M. Agnew was the owner of a sawmill and appliances, and engaged in the manufacture of lumber in El Paso county. In the spring of 1882 he was indebted to plaintiff in error in a sum exceeding in the aggregate \$2,500. One thousand two hundred and twelve dollars was evidenced by two promissory notes bearing date September 10, 1880, the last of which became due August 10, 1881, which were secured by chattel mortgage upon the property in controversy.

And of the balance, \$600 was represented by a promissory note bearing date August 10, 1881, due four months after date, also secured by a chattel mortgage upon the same property. In addition, there was at the time mentioned (spring of 1882) a book account of \$706. The latest of the notes secured by chattel mortgage matured in December, 1881. On the 22d of March, 1882, the indebtedness remained unpaid. No steps had been taken for its collection, nor had the property covered by the chattel mortgages been taken into the possession of the plaintiff. Agnew being indebted to the defendant in the sum of \$584.80 by note bearing date August 22, 1881, payable sixty days after date, the bank commenced suit by attachment, which was levied upon the property in controversy on the 22d of March, 1881, and a deputy put in charge as custodian by the sheriff. On the 28th day of March, while the property was still in the custody of the sheriff, Agnew attempted to make an assignment to the plaintiff in error and one James T. Hobbs, and executed and delivered the following paper: "Sold to R. C. Elliott and James T. Hobbs, in consideration of moneys by me owing to them, all lumber in the yard at the Agnew sawmill on the Talbot ranch, all lumber at station and on cars, all lath, all property in and about said mill and premises, and all debts due me of every name and nature for any lath, lumber, or any other property by me sold; and I do hereby transfer to said Elliott and Hobbs the entire charge of the operations of said sawmill. Dated March 28, 1882, F. M. Agnew." Elliott and Hobbs executed and delivered to Agnew the following: "We agree to use the property of Frank M. Agnew, this day sold and transferred to us, in the payment of the debt of said Agnew to the best of our ability. March 28, 1882. R. C. Elliott, James T. Hobbs." No possession of the property was taken by Elliott and Hobbs, or either of them, but was retained by the sheriff. Prior to that date, the sheriff had allowed Agnew to operate the mill and continue the business. On that day he shut it down. Although the papers above set out were passed between the

parties, the attempted assignment was abortive, the trust not being accepted by the assignees, except conditionally, and was by them repudiated. Shortly after, on the 30th of March, Elliott commenced proceedings by attachment and garnishee process against Agnew in Arapahoe county; and Agnew, being indebted to Hobbs on book account in the sum of \$1,172, he, on the 29th of March, commenced suit by attachment against Agnew in El Paso county, and the attachment was levied upon the mill property in controversy. At the same time Agnew was indebted to one Stout in the sum of \$500, who commenced suit by attachment in El Paso county, the writ being levied upon the same property. Judgments were obtained in each of the above cases by default, and executions issued which were levied upon the property; and during the month of April the property was sold on the several executions,—the defendant, The First National Bank, buying a part and Hobbs and Stout each a part. The first assertion of title to the property or right of possession by the plaintiff under the chattel mortgages appears to have been on April 17th, at the sale of the property by the sheriff on execution in favor of the bank, when he served a written notice that he was the owner by virtue of his chattel mortgages and forbade the sale. Subsequently, in August, 1882, this action was instituted by plaintiff in error (plaintiff below) against the defendant bank to recover for the alleged taking and conversion of the property purchased and taken upon the sale under the execution in case of *First National Bank v. Agnew*, alleging the plaintiff to have been the owner and entitled to the possession. Defendant justified under the proceedings in *Bank v. Agnew*. The case was referred, testimony taken before and finding by referee in favor of defendant, and judgment of the court upon the findings for the defendant.

Mr. H. B. O'REILLY, for plaintiff in error.

Messrs. PATTISON & EDSALL and Mr. ELMER E. WHITTED, for defendant in error.

REED, J., after stating the facts, delivered the opinion of the court.

The examination of this case is attended with much more than usual difficulty. Counsel, regarding this and another case, by same plaintiff v. Hobbs, *infra*, as analogous and capable of being disposed of by the determination of the same questions, obtained leave to present but one abstract and one brief and argument in both cases, when, in fact, there is hardly anything in common between them, and their solution depends upon the application of widely different principles. This being the case, this compound of concentrated presentation embarrasses the court, it being almost impossible to determine to which case a given state of facts pertains, or to which case the law is attempted to be applied. During the entire time from December 10, 1881, to March 22, 1882, it is conceded the property was not reduced to possession, and no effort made to acquire the possession, and no assertion of title under the mortgage. From March 22d, when the attachment was levied, until the 28th, there was no assertion of rights under the mortgages. On the 28th Agnew attempted, by a written instrument, made by and with the advice of plaintiff, to assign his property to plaintiff and Hobbs, as assignees or trustees for the benefit of his creditors generally, and plaintiff, by an instrument in writing, accepted the trust, jointly with Hobbs, another creditor. If this was not a waiver of any rights under the mortgages by the plaintiff, it was the acceptance of a position absolutely incompatible with the assertion of ownership of the property as mortgagee. After the acceptance of the trust for the benefit of creditors generally, he should be estopped to say that the property, the proceeds of which he was to distribute as trustee, was his own prior to and at the time of accepting the trust. The two positions of owner by virtue of his mortgages and trustee of the same property were incompatible, and his subsequent proceeding by attachment and garnishment was incompatible with either. It is well

established by the evidence that he did not obtain possession of the property either as mortgagee or assignee. When the indebtedness secured by chattel mortgages matures at different times, the mortgagee need not take possession of the property until the maturity of the last note, (provided it does not come under the two-years statutory limitation.) *Barbour v. White*, 37 Ill. 169. The last note secured by chattel mortgage matured December 10th. On March 22d following no possession had been taken, and the attachment was levied. "The time during which the property may remain in the custody and possession of the mortgagor is fixed and determined—*First*, by the mortgage itself, as, when it provided that the property shall remain in the possession of the mortgagor until default in payment, or the maturity of the debt:" *Atchison v. Graham*, 14 Colo. 217. The statute concerning chattel mortgages was literally the same as that of the state of Illinois, and has been construed for years in that state. In *Reed v. Eames*, 19 Ill. 594, it is said: "Under a chattel mortgage the mortgagee must take possession of the property upon the default of the payment of the debt. Suffering it to remain with a mortgagor after a default in payment is a fraud *per se*, not subject to explanations." See *Thompson v. Yeck*, 21 Ill. 73; *Funk v. Staats*, 24 Ill. 632; *Reese v. Mitchell*, 41 Ill. 365; *Lemen v. Robinson*, 59 Ill. 115; *Dunlap v. Epler*, 88 Ill. 82. Failing to take possession of the property the mortgage was void and inoperative against a creditor who proceeded by attachment and levy. This disposes of the case; but, as other supposed errors are urged, we will briefly examine them. It is contended that the levy by attachment was void by reason of the sheriff having failed to serve Agnew with a copy of the writ. This cannot prevail. *First*. It was a matter only available, if at all, to Agnew, and was by him waived by an appearance in the case, and an attempt to quash upon other grounds. *Second*. It not having been raised as a question between the parties to the suit, and not affecting the jurisdiction of the court, it cannot be raised collaterally by a third

party. No principle of law is better established or more widely recognized than that in proceedings of this kind a party must succeed, if at all, by showing a paramount title. If he shows none at all, he cannot build one upon the technical defects of that of the other party. It follows that the judgment must be affirmed.

Affirmed.

ELLIOTT, PLAINTIFF IN ERROR, v. HOBBS ET AL., DEFENDANTS IN ERROR.

2	169
2	167

1. ASSIGNEE, WHEN NOT LIABLE.

An assignee for the benefit of creditors is not chargeable with assets until he has become invested with them.

2. ASSIGNMENT, WHEN INEFFECTUAL.

An assignment for the benefit of creditors which is accepted by the assignee conditionally, but repudiated before obtaining possession of assets or taking action in the premises, is ineffectual.

Error to the District Court of Arapahoe County.

THE facts are fully stated in the opinion of the court.

Mr. H. B. O'REILLY, for plaintiff in error.

Mr. JOHN HIPPEL, for defendants in error.

REED, J., delivered the opinion of the court.

This case, for the purposes of abstracting, briefs, and argument, was consolidated with the case of *Elliott v. Bank*, ante p. 164. The litigation grew out of the same facts and transactions, but the determination of the suits depends upon the application of different legal principles. The suit against the bank was for a supposed illegal seizing and conversion of the property by attachment and execution. In this, the defendants are sought to be held responsible for a conversion

of a portion of the same property as assignees of one Agnew, or as trustees. A full statement of the facts is made in case of *Elliott v. Bank*, but a brief recapitulation may be, and probably is, necessary. Agnew was engaged in operating a sawmill, being the owner of the mill, appliances, logs, and lumber, subject to two chattel mortgages, held by Elliott, on a portion of the property. One matured August 19, 1881; the other December 10, 1881. No possession of the property was taken at the maturity of the indebtedness. Agnew being indebted to the First National Bank of Colorado Springs, it, on the 22d day of March, 1882, sued out an attachment which was levied upon the property, and a deputy put in charge. On the 28th of March, while the property was still in the custody of the sheriff, Agnew attempted an assignment, and the following papers were executed by the respective parties:

“Sold to R. C. Elliott and James T. Hobbs, in consideration of moneys by me owing to them, all lumber in the yard at the Agnew sawmill, on the Talbot ranch, all lumber at station and on cars, all lath, all property in and about said mill and premises, and all debts due me of every name and nature for any lath, lumber, or any other property by me sold; and I do hereby transfer to said Elliott and Hobbs the entire charge of the operations of said sawmill. Dated March 28, 1882. F. M. Agnew.”

“We agree to use the property of Frank M. Agnew, this day sold and transferred to us, in the payment of the debts of the said Agnew, to the best of our ability. March 28, 1882. R. C. Elliott. James T. Hobbs.”

Although there was a formal acceptance in writing of the trust by Elliott and Hobbs, no possession of the property passed by the assignment, nor could pass, as it was in the possession of the sheriff. How Stout, the other defendant, became an assignee, and, as supposed, chargeable, is left quite vague, but it is presumed that he was subsequently attempted to be put in, either in the place of Elliott or as an addition, but which we cannot determine from the record. Both Hobbs

and Stout (defendants) were creditors of Agnew. Immediately after the execution of the attempted assignment papers Hobbs ignored and repudiated it, and commenced proceedings by attachment. Stout, who is not shown to have accepted or in any way participated in the supposed assignment, did the same. Both attachments were leveled upon the property. Judgments obtained, and a part of the supposed assigned property sold in satisfaction of the judgments. It having been determined in *Elliott v. Bank, supra*, that he had no title to the property by virtue of his mortgages, and the attempted assignment having proved inoperative, the property never having passed into the possession of the parties for administration and distribution, it is apparent that no title to the property or proceeds were vested in the plaintiff by reason of the mortgages or the pretended assignment. Neither the property nor proceeds were administered, or attempted to be, under the assignment; consequently there could be no conversion of the property, or maladministration of a trust. What property they obtained was by operation of law as judgment creditors purchasing under sales by the sheriff in satisfaction of their respective debts. The only status of plaintiff was that of a creditor. If he failed to enforce his claims, and other creditors, by superior diligence, legally absorbed the estate, he seems to be remediless. That an assignee cannot be chargeable with the assets of the assignor until he has become invested with them as assignee is a proposition so well established that no authorities in its support are necessary. It is clearly shown by the testimony of Hobbs and Stout that the former only accepted the assignment conditionally, and repudiated it on the evening of the same day. The latter did not accept at all. "In voluntary and express trusts no title vests in the proposed trustee, by whatever instrument it is attempted to be transferred, unless he expressly or by implication accepts the office, or in some way assumes its duties and liabilities." Perry, Trusts, § 259: *Armstrong v. Morrill*, 14 Wall. 138; *De Peyster v. Clendining*, 8 Paige, 295; *Maccubbin v. Crom-*

well, 7 Gill & J. 157. As to what acts constitute an acceptance of a trust, see Perry, Trusts, § 261. The immediate proceedings of the defendants by attachment negative the supposed acceptance of the trust and liability for conversion of property.

The judgment must be affirmed.

Affirmed.

BICE, APPELLANT, v. HOVER ET AL., APPELLEES.

2	172
15	171

1. PRINCIPAL'S LIABILITY.

B., the owner of a store, turned the business over to G., who was to run it in the interest of B. at a definite wage, which was to be determined by the success or failure of the enterprise, conducted under a new name. *Held*, that the business remained B.'s, who was liable for debts incurred in the purchase of goods, unless he relieved himself by definite notice to the persons with whom the store commonly dealt, or such information was brought home to the vendors of goods in such a way as to render it inequitable to hold B. therefor.

2. CONFLICTING TESTIMONY—REVIEW OF.

Where the verdict rests on conflicting testimony, which would warrant the jury in reaching their conclusion, the verdict will not be disturbed.

Appeal from the District Court of Arapahoe County.

IN the early summer of 1887, Mark Bice, the appellant, bought from Troxwell a drug store situated on the corner of 18th and Curtis streets in the city of Denver. He ran the store in his own name until sometime in August of that year, when he formed some sort of a business connection with a person by the name of Watson. From that date the business was continued in the name of Watson & Company to about June, 1888. During all this time the concern bought goods of Hover & Company who are wholesale druggists in the city. The accounts seem to have been settled by Doctor

Bice as they accrued, and he made no question as to his responsibility prior to June, 1888, and paid whatever accounts were rendered him. About that time he entered into an agreement with one Benoni S. Greathouse. The contract was somewhat lengthy, and in general terms provided that Greathouse should take charge of, and manage the store, and receive as a salary or compensation for his labor the net proceeds resulting from the business, subject to certain specific deductions. The contract is construed in the opinion, but need not be set out to enable the decision to be understood. The present suit was brought by Hover & Company against Bice to recover for sundry purchases made between the time that Greathouse was put in charge, and the time when he was relieved in the ensuing December. The real defense was that Bice was not liable to Hover & Company for the purchases which Greathouse made. There was no question concerning the delivery of the goods or the price. It was simply a matter of legal responsibility. The case was tried to a jury which rendered a verdict against Bice who appeals.

Mr. CHAS. M. BICE, for appellant.

Mr. R. D. THOMPSON, for appellee.

BISSELL, J., after stating the case, delivered the opinion of the court.

The rights of these parties are to be ascertained and settled by the terms of the contract entered into between Mark Bice the appellant and Benoni S. Greathouse, and the course of dealing between the several parties and Hover & Company, the appellees. It would not profit the profession to set out the contract, for it is not within the range of probabilities that any similar instrument will be submitted to the courts for construction and adjudication during the probable continuance of the legal profession. It will be deemed enough to state generally the conclusions at which the court

has arrived concerning its proper interpretation. It consists of fifteen paragraphs. Some of them taken alone would seem to make the contract one of sale of a stock of goods and the transfer of the rights of Doctor Bice in the premises; eliminating these provisions and considering others alone, and it contains many of the elements of contract of lease; the remaining provisions very clearly establish the contract to be one of a hiring. As a whole it can scarcely be said to permit an interpretation which shall adjudge the agreement to be one of sale. The title to the drugs, to the fixtures, and whatever was connected with the store did not pass absolutely to Greathouse, but remained the property of Doctor Bice, and at the end of a year could be re-transferred to him, or turned over into his possession, and to the extent to which they were then *in esse* would fully satisfy Greathouse's promise in regard to them. Evidently this circumstance very conclusively demonstrates that in no proper and legal sense was there a sale of the property. It is likewise plain that it lacked many of the elements that are always to be found in a contract of lease. While the term appeared to be certain, and for a year, in fact it was only at the will of Doctor Bice, and subject to a performance of all the conditions with reference to the conduct of the business by Greathouse; there was no specific rent reserved, nor can it be ascertained from the terms of the contract whether Bice was in reality the landlord leasing to Greathouse, or whether Bice himself was a tenant who sought to sublet the property and whatever leasehold rights may have been attached to it to the subtenant Greathouse. In many other ways, were it necessary, it could be demonstrated that the agreement lacked many things ordinarily found in a lease and essential to the creation of such an interest. When these difficulties are considered and resort is had to two other provisions contained in the contract, it becomes evident that the only legitimate construction to be put upon the convention is that which determines it to be a contract of hiring. The first paragraph provides that Greathouse shall work and operate to the best

of his ability the store referred to; the 11th paragraph compels him to surrender possession whenever he shall contract debts in the purchase of goods beyond a specific sum, and also whenever he is found incapable from any cause to carry on the business without injury to it; by the 14th paragraph they agree that Greathouse shall receive as a salary for doing the work incident to the management of the business a sum co-equal with the profits, less certain deductions which were specifically provided for. It is our conclusion then, that the contract in reality was one whereby Doctor Bice turned over the business to Greathouse, who was to run it in the interest of the doctor, at a definite wage which would be determined by the success or failure of the enterprise. If this be true, the business remained the doctor's, and he would be liable for whatever indebtedness might be incurred in the purchase of goods, and in its general transactions, unless he relieved himself from that liability by a definite notice to the persons with whom the store commonly dealt, or in some way known to the law, such information was brought home to the vendors of the goods as would render it inequitable for them to hold the doctor liable for what they sold. The whole history of the transaction negatives any such conclusion. For upwards of a year prior to the time Greathouse was put in possession, the store had been run, either by the doctor himself, or under the name of Watson & Company, and during all this time he held himself out as personally responsible for whatever supplies the store might procure, and he paid the bills as they accrued and matured. During this time he had been dealing with the appellees, Hover & Company, and buying and paying for the goods furnished by them. When Greathouse went into possession he continued purchasing goods for the store, which was thereafter run in the name of the O. K. Drugstore, in place of Watson & Company which had been the previous form of its title. There is some controversy as to what information was given to Hover & Company, and whether they received notice that Greathouse was to be solely responsible for his purchases. Whatever might

be our conclusion upon the record as to what the facts were, the verdict of the jury in favor of the appellees clearly settles all these controverted questions of fact against the appellant Bice. Under our well settled rule we cannot interfere with that finding and verdict, so long as it rests upon conflicting testimony which would warrant the jury to reach the conclusion. Without the aid of the rule, we should be disinclined to interfere, since it seems to be in full accord with the fair preponderance of the testimony. According to the contract and its fair legal result, the goods were really purchased by Greathouse as agent of Doctor Bice. The attempt to change the condition of affairs, and to relieve Bice from the responsibility for subsequent purchases, was not successful, and he must be held liable both because of the legal agency and by reason of the course of the dealing antecedently had between the parties, and because the circumstances of the subsequent transactions were such as to warrant Hover & Company in assuming and believing that Greathouse was Bice's agent. As to them he was held out as such; they relied upon the responsibility of the supposed principal, who did nothing to relieve himself from liability, and he cannot complain when he is called on to pay for the goods.

The appellant insists that the case should be reversed because of the inaccuracy of some of the instructions given by the court. To demonstrate the incorrectness of this contention would render it necessary to set out the instructions in detail and review the entire evidence in the case. It is not deemed expedient to go to this extent; it is enough to state the conclusions of the court concerning the matters complained of. It might possibly be true that the instructions would be the subject of legitimate criticism if the hypothesis assumed by counsel, that the contract between Greathouse and Bice was one of lease was conceded. It will be observed that the court has already construed that contract to be one of employment. Under these circumstances, what the court said with reference to the change of posses-

sion in the property, the course of dealing between the parties, and the action which ought to have been taken by Bice in notifying Hover & Company of the change, accurately expressed the law applicable to this controversy. This is likewise true of the instruction which told the jury what Hover & Company's duty was as to the inquiries which they ought to have made. Taking the instructions together, they put the case fairly before the jury and could not have misled them as to any legal propositions on which they were entitled to legal information from the court. This disposes of these assignments of error, without reference to the attempt to save the exception in the record. Wherever an exception is necessary, and it appears as an addition to the bill prepared by the officers of the court, it ought not to be by a pencil insertion as in this case, for it is too liable to erasure, change and destruction. The form should be permanent, and without the possibility of alteration.

The record presents no errors which will permit this court to disturb the judgment, and it will accordingly be affirmed.

Affirmed.

HARPER ET AL., APPELLANTS, v. THE PEOPLE, FOR THE
USE OF BEERS ET AL., APPELLEES.

2	177
6	39
2	177
8	25

1. **LEX LOCI CONTRACTUS.**

A contract which by the law of the place where made is valid *inter partes* and as against third persons, is valid in this state notwithstanding it would have been adjudged invalid if it had been entered into within its jurisdiction.

2. **SAME—CONDITIONAL SALE.**

In this state there can be as against third persons, no sale of personal property with a valid reservation of the title or lien for the benefit of the vendor, nevertheless such conditions in the sale of property in a state where they are allowable will, upon the removal of the property into this state, be upheld.

Appeal from the District Court of Elbert County.

VOL. II—12

Messrs. ROGERS & SHAFROTH, for appellants.

Messrs. STUART BROS. & ANDREWS and Messrs. VAN-
DEVEER & MARTIN, for appellees.

BISSELL, J., delivered the opinion of the court.

The matters in issue between these parties narrow the inquiry to a single question. An epitome of the facts will make the elements of the investigation exceedingly plain. In May, 1888, the firm of Beers & Lee, composed of H. M. Beers and Albert Lee, were residents of the state of Kansas. At that date they sold to Berwick & Beers, who were domiciled in the same state, a lot of personal property on condition that the title should not vest in the vendees, except upon payment of certain promissory notes which were executed for the purchase price and delivered to the vendors at the time of the sale. The notes contained the condition. The property was then in the possession of the vendors at the place of the contract and was immediately turned over to the vendees, who brought it into this state. There is no averment in the complaint concerning the consent of Beers & Lee to the removal. It appears, however, that prior to the maturity of the paper, one of the firm came to Colorado in pursuit of the property, took it into his possession, and started back to Kansas with it. This he had a right to do by the terms of the agreement. While on the journey he was intercepted by the sheriff of Elbert county, who seized the stuff under a writ of attachment issued in a suit brought by some creditors of Berwick & Beers to recover a claim against them. There is no question made concerning the regularity of those proceedings. The present suit was brought against the sheriff to recover for the taking and conversion. The sheriff justified by a plea of the judicial proceedings in which the writ issued. A demurrer to the answer was sustained, and the case was brought to the supreme court by appeal, and subsequently under the statute

transferred to this court. It is conceded that by the law of Kansas the transaction was a valid one, and that Beers & Lee, by virtue of their agreement, were not divested of their title to the property, and had the right to enforce their claim and take possession of the chattels wherever they might find them. To those familiar with the law of Colorado the question to be settled had been foreshadowed by this statement. The radical difference between the law of the two states in such matters furnishes an apparent basis for the contentions of these parties. The law of *Twyne's Case*, (2 Coke's R., part 3, p. 80,) is the rule in Colorado. Without a compliance with the statute which provides a way in which such liens may be protected, there can be no sale of personal property in this state with a valid reservation of the title and a lien for the benefit of the vendor, when the vendee is permitted to take and retain possession. This doctrine is clearly expressed in *George v. Tufts*, 5 Colo. 162. This plain principle does not determine the rights of these parties. They entered into a contract which was entirely valid and binding both *inter partes* and as against third persons. Evidently the only question is, whether this contract, valid where made, is enforceable in a state by whose laws it would be invalid if the contract had been entered into within its jurisdiction.

There is considerable apparent diversity of opinion among learned courts on this inquiry. The differences, however, are more apparent than real. In general it may be said, that wherever there is any apparent contradiction in the adjudications it comes from a difference with respect to some one of the different elements in the propositions of fact, which are generally deemed ample when they all exist, to permit the enforcement of the contract. It is always essential to ascertain the domicile of the parties, the *lex loci contractus*, and the *situs* of the property. Wherever these unite to sustain the validity of the contract, it may be safely asserted that it is enforceable in the courts of every state where a controversy arises over the title to the property.

These elements are present in this suit. All the parties to the contract lived in Kansas. By the law of the place of the contract the agreement was a valid one against everybody. The property was within the limits of that jurisdiction when the contract was made. According to the weight of authority the removal of the property into another state, whether with or without the consent of the contracting parties, will not invalidate a contract enforceable when and where it was entered into. A multitude of authorities can be cited upon this question, but we shall content ourselves with the citation of a few well considered decisions in which the doctrine has been announced. *Mumford v. Canty*, 50 Ill. 370; *Ferguson v. Clifford*, 37 N. H. 86; *Kanaga v. Taylor*, 7 Ohio State 134; *Cobb v. Buswell*, 37 Vt. 337; *Smith & Co. v. McLean*, 24 Ia. 322; *Born et al. v. Shaw*, 29 Pa. State 288; *Crapo v. Kelley*, 16 Wall. 610; *Thuret et al. v. Jenkins et al.*, 7 Martin, 818.

It would not be profitable to discuss the reason of the rule, nor to determine whether it ought to be put on the recognized comity existing between the different sovereignties, or on the well settled principle of the *lex loci contractus*, which permits the enforcement of a contract according to the established law of the place, so long as it does not contravene the recognized policy of the state of the forum. Both principles are frequently invoked. According to the *Mumford* case, the contract will not be deemed to be opposed to the policy of the state unless based upon immoral or criminal considerations. In either case and upon either ground the contract may be upheld.

The judgment of the trial court was assailed because the judge based his decision upon the fact that the vendors were in possession of the property at the time it was seized under the writ. It is contended that this is an erroneous basis upon which to rest the judgment, and that it contravenes the well considered case of *Wilson v. Voight*, 9 Colo. 614. It was there decided that a mortgage on property situate in the state, executed between parties who lived here, could not be made a

valid lien as against attaching creditors by any act of the mortgagee in assuming possession before the levy of the writ. The court adjudged an instrument of that sort absolutely invalid under the law, and very properly held that the rights of the parties could not be aided by any subsequent act concerning the possession, where it was assumed under the contract itself, and there had been no delivery of the property in payment of the debt, or in execution of a new and valid contract. No such question is involved here. According to the conditions of an absolutely valid contract the vendor took possession of the property. This he could rightfully do, and it might well be held, regardless of the question of policy, that no subsequent levy should be permitted to disturb a title which had thus become united with the possession. If it was considered that the policy of this state as expressed by its statutes would, under some circumstances, protect the rights of subsequent execution creditors, the rule would not be deemed applicable under these circumstances.

The case presents no other questions, and since the judgment of the court below is in harmony with the law herein laid down, it must be affirmed.

Affirmed.

DRENNON, APPELLANT, v. ROSS, APPELLEE.

1. NEGOTIABLE PAPER—TIME CHECKS.

Time checks are negotiable, and the assignee thereof may maintain an action thereon in his own name, free from any defense growing out of transactions between the original parties after notice of assignment.

2. ASSIGNEE MUST GIVE NOTICE.

If the assignee of such paper fails to give the payor notice of its assignment, the payor will not be precluded from setting up a defense growing out of his subsequent dealings with the original payee. The burden and duty of giving notice of the assignment devolves upon the assignee.

B. GARNISHMENT. PAYMENT WITHOUT NOTICE.

After giving a time check, the payor was garnished as a debtor of the payee, and, without notice of assignment, answered, admitting indebtedness in the amount of the check. Judgment was entered against him and paid; *held*, an ample defense to a suit by the assignee to recover upon the check.

Appeal from the County Court of Lake County.

Mr. J. E. HAVENS, for appellant.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court.

The superintendent of The New Discovery mine, on behalf of Robert Drennon the owner, issued the following time check: —

“NEW DISCOVERY MINE, Dec. 27, 1888.

This is to certify that George Ross has worked in the month of November, 27 days at \$3.00 per day, amounting to \$81.00 less \$40.00 paid, leaving due him \$41.00. For month of December, 22½ days at \$3.00 per day, amounting to \$67.50. Total amount due \$108.50, Ernest Wendland.” M. F. Ross as assignee sued Drennon before a justice in Lake county and recovered a judgment for the amount of the check. This judgment was affirmed in the county court. It was brought by appeal to the supreme court, whence it was transferred to the court of appeals for determination. There was no controversy concerning the performance of the labor by Ross, or the issue of the time check on Drennon’s account. It seems to have been conceded that George Ross indorsed the check on the 27th of December, 1888, “Discovery Mine pay the above to M. F. Ross. George Ross.” The record is silent concerning the delivery to M. F. Ross after the indorsement, but it was assumed on the trial that she acquired title to the paper. The dispute arose out of a payment of the money in another judicial proceeding to which Drennon and George Ross were parties. Prior to the commencement

of the present action one Robinson sued George Ross and got judgment against him for more than the amount of the paper. After Robinson obtained judgment he garnisheed Drennon. Drennon answered before the justice, and stated that Ross had worked for him at the mine, and had earned \$108.50 which had not been paid him. In answer to the inquiry whether he was still indebted to Ross on that account, he said a time check had been issued for the wages, and if it had not been transferred and still belonged to George Ross he owed him that money. George Ross and the assignee were both present when Drennon answered. Immediately on the completion of the answer, the justice entered judgment against the garnishee for that amount. Thereupon Drennon paid the money into court in satisfaction of the judgment. Neither during the proceedings, nor subsequently, did the assignee take any steps to protect her claim. She permitted the judgment to go unchallenged, and allowed the payment to be made without objection. A few days afterwards she brought this suit against Drennon to recover the money. Unless the result be forced by some well established principle of law it would be inequitable under the circumstances to permit Ross to gather his harvest twice.

Ever since the decision in the *Rio Grande Extension Company v. Coby*, 7 Colo. 300, it has been the settled law of this state that memorandum checks of this description are negotiable paper under the Colorado statutes. This negotiability, however, is not coextensive with this characteristic when applied to ordinary commercial paper. Under none of the decisions has the owner been protected to the limit always accorded to the holder of the paper of commerce when he acquires a title in good faith and for a valuable consideration before maturity. The holder undoubtedly acquires the right to maintain an action upon the memorandum in his own name, and it will be subject to no defenses growing out of any transactions between the original parties occurring after notice of the assignment. The burden and the duty of giving notice devolves on the assignee. If he fails to give notice he can-

not complain if the payor set up a defense growing out of his subsequent dealings with the original payee. *Moore v. Metropolitan Bank*, 55 N. Y. 41; 2 Parsons' Notes & Bills, chap. 2, sec. 4, p. 46.

M. F. Ross never gave any notice to Drennon that she was the holder or the owner of the check. She made no attempt during the trial of the garnishment proceedings to present, or assert her claim, but permitted the garnishee to answer, judgment to pass, and the money to be paid without protest. Under these circumstances it violates no settled principle of law to hold that the payment by the garnishee, which he had a right to make under the statute, is an ample defense to a suit by the assignee to recover the money.

The judgment entered by the county court does not accord with the law, and the case must be reversed and remanded.

Reversed.

THE PLATTE AND DENVER CANAL AND MILLING COMPANY, APPELLANT, v. LEE, MAYOR OF DENVER, ET AL., APPELLEES.

1. DITCHES—VESTED RIGHTS.

A ditch for beneficial purposes was constructed across land which at the time was parcel of the public domain of the United States and before the land was included by the city limits, and has been maintained and operated ever since. *Held*, that its owner has a vested right to the use and enjoyment thereof.

2. POLICE POWER.

A city council cannot under its police power require such a ditch to be confined and reconstructed by boxing, fluming or otherwise, for the purpose of preventing the washing and cutting away of property situate along its line and belonging to other parties.

3. SAME—RECITALS NOT CONCLUSIVE.

A recital in an ordinance that "public welfare and safety require" an act to be done is not conclusive upon the judiciary. Courts are not bound by mere forms, nor are they to be misled by mere pretenses.

4. SAME—LIMITATION UPON.

A city council cannot under its police power to promote public health,

morals or safety, require the performance of an act which has no real or substantial relation to those objects.

5. PROSECUTION, MAY BE ENJOINED, WHEN.

A city may be enjoined from prosecuting a property owner for violating an ordinance, when such prosecution tends to impair vested rights in the property, or by reason of a multiplicity of suits inflicts irreparable injury without authority of law.

Appeal from the District Court of Arapahoe County.

Messrs. MARKHAM & DILLON and Mr. E. A. CLARK, for appellant.

Mr. JOHN F. SHAFROTH and Mr. O. C. MARSH, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

The plaintiff, a corporation under the laws of this state, by its complaint alleges in substance as follows:

That it has now under its control and in operation a ditch constructed by the Platte and Denver Ditch Company in the year 1864; that the ditch was constructed for the purpose of furnishing water for milling, manufacturing and irrigation.

That the company, by prior occupation and appropriation, acquired the right of way and easement along the route of said ditch through the city of Denver, where the said ditch now runs; that the lands within the limits of the city of Denver through which the ditch was constructed were, at the time of the construction, a part of the public domain, and so remained a part of the public domain until long after the construction of said ditch.

That the rights of the city of Denver or the inhabitants thereof, if any, were acquired subject to the prior vested rights of the Platte and Denver Ditch Company.

That all lands acquired by the city and the inhabitants thereof were subject to the rights and privileges of the company:

That the Platte and Denver Ditch Company, prior to the time of the expiration of its charter, leased certain water

rights to divers and sundry persons, some of which water rights to be perpetual leases for milling purposes, and that the lessees and their assigns relied upon these leases and constructed large flour mills to be operated by the water power thus leased, and the water from the ditch has been for many years used for the purpose of operating the machinery of said mills, and cannot be dispensed with except at ruinous loss.

That the Platte and Denver Ditch Company, by proper conveyances, in the year 1884, conveyed its ditch and right of way together with its rights, privileges and appurtenances to the plaintiff company; that one of the chief considerations for the conveyance was that the plaintiff was to keep good the contract or lease of water rights and power theretofore made.

That the Platte and Denver Ditch Company, as well as the plaintiff, kept the ditch in good order and repair, and have maintained and kept the same without any negligence whatever.

It is further set up that in a certain cause entitled *The City of Denver v. Mullen*, the district court, in and for the county of Arapahoe, granted a decree to the effect that as to the city of Denver the plaintiffs were lawfully and of right entitled to the full and unobstructed flow of water through and along the Platte and Denver ditch to the mills of the plaintiffs, without any let or hinderance or obstruction of the water in said ditch, and without any interference with said ditch by the city of Denver or its agents or employees; and therein and by the said decree enjoined the city of Denver, its agents, attorneys and employees from in any wise or manner interfering with the ditch or water therein.

Subsequently the decree entered in said cause was affirmed in the supreme court.

That thereafter in another cause, entitled *Anderson v. The Platte and Denver Ditch Company*, the rights of the owners and operators of the ditch were sustained.

That on or about the 25th day of February, 1888, plaintiff

received the following notice from the mayor of the city of Denver: "You are hereby notified to comply with the order of the city council of the city of Denver, as expressed in Ordinance No. 10, 1888, passed and approved the twenty-first day of February, A. D. 1888, in this, to-wit: To confine the channels of the ditches operated and controlled by you to the width and depth in said ordinance specified, and so to construct the same as to prevent washing and cutting away of the property along the lines of said ditches. Upon failure to comply with said requirements and upon failure to begin the said work within ten days from the receipt of this notice you will be proceeded against according to law.

"WILLIAM SCOTT LEE, Mayor."

The ordinance referred to reads as follows:

"A bill for an ordinance to change the construction of the ditches operated and controlled by The Platte and Denver Ditch and Milling Company within the limits of the city of Denver.

"Be it enacted by the city council of the city of Denver.

"Section 1. Whereas in the opinion of the city council of the city of Denver, the public welfare and safety require there should be a change in the present construction of the ditches operated and controlled by The Platte and Denver Ditch and Milling Company within the limits of the city of Denver, the said Platte and Denver Ditch and Milling Company is hereby ordered to so confine and construct the channels of their said ditches by boxing, fluming or otherwise, as to prevent the further washing and cutting away of the property along the lines of the said ditches, and to reduce their said channels to a maximum width of eight feet for each of their said ditches, and a maximum width of not to exceed sixteen feet where the waters of both said ditches flow in one channel, viz. from Mullen's mill, in West Denver, thence running in a northerly direction to a point where the waters of both said ditches empty into the South Platte river, and to a depth sufficient only to carry the necessary water for all purposes of said The Platte and Denver Ditch

and Milling Company, pursuant to section 4 of an ordinance entitled, ' Ordinance No. 38, 1886, Ditches and Flumes for Manufactories ' passed and approved the 22nd day of March, A. D. 1886."

Section 4 of ordinance No. 38 reads as follows :

"Section 4. All persons or corporations, making, constructing, owning or using any ditch, flume, bridge or crossing as aforesaid, shall keep the same in good repair whenever so required to do by said city, and all ditches, flumes, bridges and crossings shall be located, constructed and built under the supervision of said city, or some officer of said city duly authorized to superintend the same, and the city council shall have the right and power to order, from time to time, such changes in the location and construction of the same as in their opinion the public welfare and safety require ; and every such person or corporation who shall neglect, fail or refuse to comply with the requirements of this article, or to obey any order of said city in reference to the same after ten days' notice in writing, signed by the mayor, has been served on such person or corporation, shall, upon conviction thereof, be fined in a sum of not less than fifty dollars nor more than one hundred dollars, and shall be liable to be prosecuted for every day such person, persons or corporations shall neglect, fail or refuse to comply with the requirements or provisions of this article, or the requirements of said city council, as distinct and separate offenses, and upon conviction be fined as aforesaid."

To this complaint a demurrer was interposed and sustained. Plaintiff elected to stand by its complaint and prosecutes this appeal.

Practically but two questions are presented for our consideration : Are the ordinances invalid. Has the chancery court power to pass upon the invalidity of the ordinances and enjoin the city and its authorities from prosecuting the plaintiff for violation thereof.

It is contended by counsel for appellees that the above re-

cited section is valid and clearly within the police power of the municipality. We cannot subscribe to that view.

“The construction of statutes by which it is determined whether they contravene constitutional provisions or not, frequently requires nice discrimination between matters which concern private rights and such as affect the public weal; between matters in which the private interest is immediate and the public interest remote, and such as interest the public directly and individuals incidently. The taking of property, or the legislative interference with private rights, as a police regulation, must have for its immediate object the promotion of the public good, in the broadest sense.”

Upon a review of the authorities and upon principles consistent with “the genius of our free institutions and the constitutional guarantees of rights,” it may be fairly deduced that the tests of all police regulations affecting proprietary rights are: Whether they are enacted in the real interest of the public, and whether the public interests are sought to be subserved by appropriating to public use private property otherwise than in the exercise of the right of eminent domain. In judging whether or not a statute falls within the first class, we have a wide field of inquiry. We may determine whether the provisions of the act are such as to be essential to the public good, or only impose harassing burdens upon individuals; whether the statute, on pretense of serving the public, diminishes the property of one man to augment that of another; and whether the subject of regulation includes things in which the public have no interest, or rights in no way antagonistic to the general good.

There is no safer method of arriving at the object of the statute than to ascertain the purpose it may be used to subserve. When we come to consider the extent to which these ordinances may be made to operate, we are led to believe that it would be dangerous to say that the city council could assume the power to abridge previously acquired rights of the ditch company. Ordinance No. 10 is defined as an ordinance to change the construction of the ditches operated and con-

trolled by The Platte and Denver Ditch and Milling Company, and the section recites that in the opinion of the city council the public welfare and safety require there should be a change in the present construction of the ditches operated and controlled by The Platte and Denver Ditch and Milling Company within the limits of the city * * * and it is hereby ordered to so confine and construct the channels of their said ditches by boxing, fluming or otherwise, as to prevent the further washing and cutting away of the property along the lines of said ditches, and to reduce their said channels to the maximum width of eight feet for each of their said ditches, and a maximum width of not to exceed sixteen feet where the waters of both of said ditches flow in one channel.

The mere recitation in the ordinance that the "public welfare and safety" require this to be done is not binding upon the court. We are warranted in going beyond this recitation and inquiring what the evident purport is. Certainly the title of the ordinance is inconsistent with the recitation; the purpose for which the ordinance was passed is equally inconsistent with the recital. It evidently contemplated a change in the construction, reducing the width of the ditch or ditches operated by the complainant company, and also that such changes and reconstruction of the ditch should be made for the purpose of preventing the further washing and cutting away of the property along the lines of the same.

This means, then, in substance that the city by this ordinance is seeking to protect the property rights of individuals along the lines of the ditch or ditches acquired subsequent to the construction of the ditch and subjected to the rights of the company. It is nowhere indicated by the provisions of the ordinance in what way the public welfare and safety can thus be benefited or protected, and we are unable to conceive how public interests can be promoted by reducing the width or depth of the ditches, or changing the construction of the ditches, or protecting the banks of the ditches, as specified in the ordinance.

In *Mugler v. Kansas*, 123 U. S. 661, this language is used: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

This doctrine applicable to a legislative act is equally applicable to an ordinance like the one under consideration.

It will be observed that this section of the ordinance was passed by the city council for the purpose of bringing the complainant company within the provisions of section 4 of ordinance No. 38, which provides a penalty for the violation of an order or notice issued by the mayor upon any person or corporation failing to comply with such order or notice, and was so passed in pursuance to the authority conferred upon the city council by section 4.

Section 10 was passed two years subsequent to section 4.

Section 4 provides for the making, constructing, and using of ditches, flumes, bridges and crossings, and for the location, construction and building of them under the supervision of some city officer, conferring upon the city council power from time to time to change the location and construction of the same, as in their opinion public welfare and safety may require. In addition to this, for the mayor to duly notify the person or corporation.

The mayor did so notify the complainant company and threatened prosecution if the company neglected to comply with the provisions of section 10 of the ordinance, to wit: confine their ditch by some means or other so as to prevent the further washing and cutting away of property along the line of the same, and to reduce their ditches in width. A

failure to comply with this provision would, under the ordinance, subject the complainant company to daily prosecutions and fines of not less than fifty dollars nor more than one hundred dollars.

By the demurrer to the complaint it is admitted that the ditch in question was originally constructed through lands embraced within the public domain, and belonging to the United States prior to said lands being embraced within the city limits. *City of Denver v. Mullen et al.*, 7 Colo. 346; *Platte & Denver Ditch Co. v. Anderson*, 8 Colo. 132; *Walley v. Platte & Denver Ditch Co. et al.*, 15 Colo. 379.

The foregoing reasons, coupled with the doctrine embraced in the above cited cases, lead us to the conclusion that the ordinances in question, so far as they affect the complainant company, are invalid and void.

This brings us to the consideration of the second question: Can the court enjoin the defendants from prosecuting the complainant company for violation of the ordinances?

It may be admitted that equity would not enjoin the action of municipal corporations while proceeding within the limits of their well defined powers as fixed by law; yet it is claimed that it has undoubted jurisdiction to restrain them from acting in excess of their authority, and from the commission of acts which are *ultra vires*. High on Injunctions, § 241.

It is a well recognized principle that courts of equity will grant an injunction to protect a party against a multiplicity of suits.

Under the ordinance in question, as before stated, the representatives of the complainant company would be subject daily to arrest for a failure to comply with the order of the mayor. And should they successfully present their defense in such a proceeding, it does not follow that they would not be continuously harassed by repeated arrests for the violation of ordinances which we have herein declared invalid. And pending the final determination of the validity of this ordinance or the completeness of the defense, innumerable

actions might be commenced against them, thus subjecting them to great expense, inconvenience and embarrassment.

In the case of *Smith v. Bangs et al.*, 15 Ill. 339, Treat, C. J., lays down the following doctrine:—

“A court of equity will interfere by injunction where public officers under claim of right are proceeding illegally to impair the rights or injure the property of individuals or corporations, or where it is necessary to prevent multiplicity of suits. Where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction at the suit of any person who is injuriously affected thereby to stay its execution by injunction. *Mayor of Baltimore v. Radecke*, 49 Md. 218.

We do not look upon this proceeding on the part of the city to impose a penalty for the violation of the ordinance as coming within the scope of the authorities holding that equity will not interfere by injunction to prevent criminal prosecution for violation of illegal ordinances or statutes; but rather incline to the belief that the imposition of a penalty is for the purpose of compelling the complainant to comply with the ordinance by reducing the width of its ditches and to protect the banks of such ditches. It is true that the ordinance imposed a fine for disobedience of the order after ten days' notice, but nevertheless this must be considered in conjunction with section 10, which seeks to impose duties upon the complainant company wholly unwarranted, and which clearly infringes upon the vested rights of the company.

In the case of *Cape May & Schellenger's R. R. Co. v. City of Cape May*, 35 N. J. Equity, 409, this language is used: “Whatever doubts may have before existed, respecting the power of the courts to control the acts of the municipal corporations, they seem now to be at rest, and the line defining in what cases they may intervene, and in what they should not, seems to be marked distinctly and with precision. The rule upon this subject is stated with perspicuity by Judge Dillon, as follows:—“There can, ordinarily, be no

judicial restraint or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which do not violate private rights." Dillon on Mun. Corp. (3d ed.) § 908.

Chancellor Zabriskie, in speaking upon the same topic, says: "All legislative acts, or exercise of discretionary powers, within their authority, are beyond the control of the courts, however unwise, or impolitic, or even when done from corrupt motives, or for unworthy purposes. Their legislative powers are, when exercised within their authority, supreme. But when the corporation have fulfilled their legislative functions, and have exercised their legislative discretion—and are about carrying their legislation into execution, then, if the effect of their acts is to violate vested rights or inflict irreparable wrong, the courts may properly intervene."

There is no difficulty whatever in applying this rule to the case in hand. It falls indeed directly within it. The provisions of ordinance No. 10 is aimed specifically at complainant in this case. It seeks to compel it to do certain acts which, from the very nature of things, violate vested rights which have received recognition in the supreme court of this state. *City of Denver v. Mullen et al., supra.*

"The question of the degree of interest in the subject-matter which is requisite to render one a proper party plaintiff, to institute an action for the purpose of restraining misconduct on the part of municipal corporations on their officers, is one of much practical importance and deserving of special attention. In general it may be said that to warrant the interference of equity in this class of cases, the aggrieved party must show that some special and peculiar injury, personal to himself, is likely to result from the act complained of, aside from the general injury to the public." High on Injunctions, § 1298.

What then is the situation of the parties to this proceeding? The company insist that they have acquired, by virtue of their location and construction of this ditch and by virtue of legislative authority, vested rights as against the city and

its inhabitants. The supreme court of this state in three different decisions have upheld this assertion.

The city of Denver by a general ordinance applicable to corporations of a similar nature, to be created and those already in existence, have provided by ordinance that such corporations shall keep their ditches in good repair whenever so required to do, and all such ditches, flumes, bridges and crossings shall be located, constructed and built under the supervision of the city or some officer of said city duly authorized to superintend the same. And that the city council shall have the right and power to order from time to time changes in the location and construction of the same as in their opinion the public welfare and safety require. And further that every person or corporation who shall fail or refuse to comply with the requirements of the ordinance or to obey any order of the city in reference to the same after ten days' notice shall be fined, etc.

To make this provision of the ordinance effective as against complainant company they passed what has been denominated this Ordinance No. 10, and made it applicable to the complainant company only, and insist by this subsequent ordinance that the channels of the ditches shall be confined within certain definite limits, reducing the capacity of the ditches to carry water, and provide that if such things are not done then, in conformity with the provisions of section 4, the person or corporation shall be daily prosecuted and fined for failure so to do.

If this does not tend to impair vested rights and is not calculated to inflict irreparable wrong without authority in law, then we are unable to appreciate the full force and effect of the English language.

True it may be said with some force that the ordinance imposed a penalty for failure to comply with its provisions, but such failure to so comply is not classified as a misdemeanor or a crime, but the penalty is imposed because the complainant company refused to surrender their acquired and well recognized rights. It is the corporation that is affected.

and not the public. It is the corporation that is liable to have continually imposed upon them fines and to be continually harassed by legal proceedings.

We think that this is a case that peculiarly addresses itself to a court of equity, and that the court erred in sustaining the demurrer to the complaint.

The judgment must be reversed and the cause remanded.

Reversed.

REEVES, ET AL., PLAINTIFFS IN ERROR, v. THE PEOPLE,
DEFENDANTS IN ERROR.

1. CONTEMPT PROCEEDINGS—REVIEW OF.

The court upon review of contempt proceedings will limit its inquiry to the jurisdiction of the court below. If the facts disclosed by the record are sufficient to constitute a contempt, the court had jurisdiction and its orders will not be reviewed for mere errors.

2. CONTEMPT—FACTS CONSTITUTING.

M. intervened in a replevin suit, claiming to be entitled to the property in controversy. Judgment passed against him as well as the defendant and in favor of the plaintiff. Knowing the result of the action, he, with the aid of R., clandestinely took the property and removed it without the jurisdiction of the court before its order could be complied with. *Held*, that such facts constitute a contempt and that the court below had jurisdiction to impose a penalty.

Error to the County Court of Phillips County.

Messrs. SMITH & MUNTZING and Mr. J. A. BENTLEY, for plaintiffs in error.

Mr. S. W. JONES, attorney general, and Mr. H. RIDDELL, for defendants in error.

RICHMOND, P. J., delivered the opinion of the court.

This was a proceeding in the name of the people of the state of Colorado against the defendants, Reeves and Meyer,

for contempt. In the year 1889, Thomas White instituted a suit in replevin in the county court of Phillips county against one James P. Brophy to recover possession of certain described animals. Brophy left the country without answering the complaint and default was entered against him. Plaintiff in error, Alex. F. Meyer, filed his plea of intervention under the statute, asserting his right to immediate possession of the property by virtue of a chattel mortgage from Brophy duly executed and recorded. To the plea of intervention an answer was filed by White and a replication to the answer followed. Under these pleadings the controversy litigated related to Brophy's ownership of the chattels and right to give the mortgage in question.

July 27th, the court rendered judgment that the plaintiff, White, was at the commencement of the action the owner of the property described in his affidavit of replevin, and was entitled to the possession of the same. * * * "It is therefore considered by the court that the plaintiff, Thomas White, do have and recover against Alex. F. Meyer, the intervenor, the costs of said intervention herein expended, and that the said plaintiff, Thomas White, do have possession of the property described in the petition of replevin, and that the said plaintiff do have judgment against James P. Brophy, defendant, for his costs in said replevin action."

It appears by the record that notwithstanding the order and judgment of the court, Meyer and Reeves, on the 30th day of July, 1889, before the property had been turned over to Thomas White as per order of the court, took possession of the property and removed it beyond the jurisdiction of the court. For this act they were judged in contempt of the court and fined in the sum of \$150, besides costs.

It is insisted on behalf of plaintiffs in error that the defendants, Reeves and Meyer, cannot be held for contempt, because, as it is assumed in the argument, the property had been turned over to plaintiff in conformity with the statute and order embraced in the writ, and that, so far as Reeves is concerned, he was in no sense a party to the record and could

not be held for contempt, although he assisted in removing the property beyond the jurisdiction of the court. The plaintiff in error by the record presented to this court has precluded himself from insisting upon the contention that the property had been transferred to the custody of the plaintiff. The record recites that it had not been; it shows that the sheriff still retained the custody of the property under the writ, and that while so in the custody of the sheriff it was removed from the jurisdiction of the court.

We are not warranted in going outside of the record to ascertain what the actual facts in the case were, but are under obligations to accept the record as presented by the plaintiff in error.

This then eliminates from our consideration all questions save and except whether or not the facts presented show that a contempt had been committed. And, if they are sufficient, the court may take jurisdiction and its subsequent orders will not be reviewed for more errors.

In the case of *Knott v. The People*, 83 Ill. 532, it was held that, "Where property is replevied before a justice of the peace, and an appeal taken to the circuit court, if the defendant in replevin and *another* take the same from the plaintiff and place it beyond his reach, the circuit court will have the rightful power to enter a rule upon them to restore it to the plaintiff, and punish them by fine and imprisonment for disobedience."

In the case of *The People ex rel. Blumle v. Neill et al.*, 74 Ill. 68, it was held that, "A party from whose possession personal property has been taken by an officer by virtue of a writ of replevin, is guilty of contempt of court if he forcible retakes the possession thereof after the goods have been by the officer delivered to the plaintiff in replevin." *Yott v. The People ex rel.*, 91 Ill. 11.

Meyer testifies in his own behalf that he resides in Yuma county; that on the 30th day of July, about four o'clock, with the assistance of Reeves he took the property mentioned in the information from the pasture of W. G. Helland, in the county

of Phillips, as mortgagee under a chattel mortgage executed by Brophy to one Steine and by Steine assigned to Meyer for a valuable consideration; that the notes secured by said mortgage were taken up and a new mortgage given, which was the mortgage litigated in the replevin suit. That he was the owner of the mortgage which had not been released or paid; that the reason that he took the property was that after the court had decided the intervention he filed his appeal bond and a motion for a receiver of the property pending the appeal, which motion was denied, and that he had no other recourse except to take the property under the mortgage and remove it into Yuma county where he might sell it to pay his debt, and that White had given no sufficient bond in the suit and was utterly insolvent. He was therefore afraid he would lose his debt. By his own testimony he admits that his rights as intervenor were passed upon by the court, and admits knowledge of the judgment of the court in favor of plaintiff against him as well as against the defendant. But nevertheless he assumed the right as a protection to himself and in contempt of the judgment of the court, for the purpose of paying his own debt, to clandestinely, by the aid of Reeves, remove the property without the jurisdiction of the court and before the order of the court could be complied with.

We think that the facts as they appear from the record constitute a contempt, and that the court below had jurisdiction to impose a penalty. Beyond this we are not authorized to review the record: *Cooper et al. v. The People ex rel. Wyatt*, 13 Colo. 337.

The judgment must be affirmed.

Affirmed.

STEVES ET AL., PLAINTIFFS IN ERROR, v. CARSON ET AL.,
DEFENDANTS IN ERROR.

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SUMMONS.

When summons is not issued within thirty days after complaint was filed, the suit was properly dismissed on special appearance of defendant for the purpose of such motion, and the motion is not addressed to the discretion of the court.

Error to the District Court of Pitkin County.

Messrs. WILSON & STIMSON, for plaintiffs in error.

Mr. PORTER PLUMB, for defendants in error.

RICHMOND, P. J., delivered the opinion of the court.

On the 5th day of June, A. D. 1889, plaintiffs in error, Parker Steves et al., filed a complaint in the district court of the Ninth judicial district in and for the county of Pitkin, and no summons was issued therein.

On the 6th day of July, 1889, the defendants in error appearing specially for the purposes of the motion and moved the court to dismiss the cause because no summons had been issued in said cause within the period of time required by law.

Thereafter, on the 9th day of July, 1889, plaintiffs in error moved the court for leave to issue summons in said cause, notwithstanding the thirty days had elapsed since the filing of the complaint, on the ground that failure to issue summons in said cause was due to excusable neglect and oversight, and in support of the motion filed several affidavits.

This motion was denied and judgment of dismissal entered, to reverse which plaintiffs in error prosecute this writ.

The only error assigned is the dismissal of the action in the court below.

Section 33 of the Civil Code, Session Laws, 1887, page

104, provides as follows :—"The clerk shall endorse on the complaint the day, month and year the same is filed, and at any time within one month after the filing of the same, the plaintiff may have a summons issued. The summons may be signed by the clerk and directed to the defendant to be issued under the seal of the court or it may be signed and issued by the attorney for the plaintiff."

In the case of *Coombs v. Parish et al.*, 6 Colo. 296, the supreme court of this state held that, "When summons is not issued within thirty days after filing complaint, that the suit was properly dismissed on special appearance of defendant for the purpose of such motion."

There appears no adjudication of the supreme court upon this question which in any way conflicts with the conclusion therein reached, and we think that the decision in that cause is conclusive upon us.

However much the circumstances as detailed in the affidavits might have appealed to the discretion of the court in the matter, we are unable to concede that the question of discretion is in any way involved.

Two methods are pointed out by the section of the code referred to for issuing summons: one signed by the clerk directed to the defendant, or signed and issued by the attorney for the plaintiff.

Certainly the clerk would not issue a summons in any cause without being so directed to do by the plaintiffs or their attorneys, and the failure of the attorneys on behalf of the plaintiffs to issue the summons would indicate that for some reason best known to themselves they did not desire a summons to be issued. The failure so to do in our judgment places it absolutely beyond the power of the court to grant the relief asked. The defendants having limited their appearance specially were not within the jurisdiction of the court whereby they would be bound by any order it might make in the premises.

The cause was properly dismissed and the judgment is affirmed.

Affirmed.

STEVES ET AL., PLAINTIFFS IN ERROR, v. CARSON ET AL.,
DEFENDANTS IN ERROR.

Error to the District Court of Pitkin County.

Messrs. WILSON & STIMSON, for plaintiffs in error.

No appearance for defendants in error.

RICHMOND, P. J. This cause was submitted by stipulation in connection with cause above determined, *ante* 200, and involves precisely the same question as is presented in that cause; judgment is therefore affirmed.

Affirmed.

THE COLORADO MIDLAND RAILWAY COMPANY, APPELLANT, v. RUEDI ET AL., APPELLEES.

1. PRACTICE—EMINENT DOMAIN.

In a proceeding under the "Eminent Domain Act," a petition filed in vacation should be presented to the judge in order that he may comply with the provisions of the statute, requiring him to note thereon the day of presentation, etc. Upon presentation thereof he shall order summons issued, and the clerk shall *at once* issue the same.

2. SAME.

After a postponement of the issuance of summons until the rights, title or interest of respondent in and to the premises, sought to be condemned, have been determined, without a showing by supplemental proceeding or petition indicating to the court that such interests have been determined, and what such interests are: *Held*, sufficient to support a motion dismissing the proceeding.

3. PROCEEDING LIMITED.

Proceedings in condemnation can only be instituted under the particular statutes which warrant them, and the right is limited to those who seek to take the property belonging to others.

Appeal from the District Court of Pitkin County.

Mr. H. T. ROGERS, and Messrs. WILSON & STIMSON, for appellant.

No appearance for appellee.

RICHMOND, P. J., delivered the opinion of the court.

By the abstract of record in this case we learn that on the 15th day of June, 1887, appellant filed in the office of the clerk of the district court of Pitkin county a petition for condemnation of lands. After the usual allegations, showing appellant's right to proceed in this manner to acquire the right of way, and giving a description of the property in question, the petition proceeds as follows:

"That the said defendants appear to claim some interest in said premises as appearing of record, and that the defendant, John Ruedi, appears to have purchased the same from the United States, and to have made entry thereof as a pre-emption claim on or about the sixth day of October, A. D. 1884, but petitioner is informed and believes and so states the fact to be that since the date of said entry the same has been protested and has been suspended and held for cancellation, and now is suspended and held for cancellation by order of the honorable commissioner of the general land office of the United States.

"That the compensation to be paid for the said above described real estate cannot be agreed upon between your petitioner and the said defendants or any thereof, and the petitioner is unwilling to pay any compensation for said lands or for the damages thereto, or to the residue thereof, so long as said pre-emption entry is suspended and held for cancellation, as aforesaid. That in the event of the cancellation of said entry by the United States, your petitioner will be the owner of said strip of land for right of way under and by virtue of the act of congress of March 3, 1875, granting right of way to railroads over and across the public lands of the United States, and by virtue of the filing and approval of its profile map over and across said premises, in accordance with said act of congress, all the provisions

and requirements of which have been complied with by your petitioner.

“Your petitioner further says that now and so long as the suspension of said entry shall continue, it is the owner of said right of way and strip of land for right of way under and by virtue of its compliance with said act of congress, as aforesaid.

“But that in the event of said entry being sustained by the said honorable commissioner of the general land office, your petitioner will be ready and willing to pay a just and reasonable compensation for the said strip of land sought to be condemned herein, to the owner or owners thereof when ascertained.

“Therefore your petitioner prays:

That in the event of said entry being sustained, your honor will then cause the compensation to be assessed, and pay to the owners of said land and premises, and to that end that the said defendants, John Ruedi, Porter Plumb, James M. Downing, D. M. Van Hoevenbergh, John C. Eames and Elmer T. Butler, and each and every person owning or claiming any interest in said premises, may be summoned to appear before this honorable court and show cause why said premises should not be taken by your petitioner for the purposes aforesaid, and why they should not accept a reasonable compensation, if any be adjudged to them, or either of them, as owners of or interested in said premises, for the taking and appropriation of the same, or for injury or damage thereto by reason of the construction of said railway line over and across the same.

“And your petitioner further prays that the right to use, occupy and appropriate said premises to the extent and for the purpose aforesaid, be adjudged to your petitioner and to its successors and assigns forever.

“Your petitioner further prays that in the event of the cancellation of said entry of said lands by the United States, and due proof thereof, this proceeding be dismissed, and that until the decision of the said honorable commissioner

of the general land office shall be rendered, sustaining or canceling said entry, this action and proceeding shall be stayed and continued.

“And that your honor will grant your petitioner such other and further relief in the premises as shall be just and equitable.”

Following the petition in the record are seven orders entered at different terms of the court during the years 1887, 1888 and 1889, in these words:

“On this day it is ordered by the court that this cause be and the same is hereby passed.”

On January 15, 1889, defendants appearing specially for the purposes of the motion, moved the court to dismiss the above entitled cause and petition, for the reason that no summons had been issued in said cause within the time required by law; that the petition in said cause was filed on the 15th day of June, 1887; that no day was then or has since been set when the matters contained in said petition would be heard; that no order for the issuance of summons to defendants was ever made; no summons has ever been served on any of the defendants.

On May 6, 1889, the court entered an order that the cause be passed.

On August 14, 1889, a motion to dismiss was argued by counsel.

On August 29, 1889, plaintiff filed its motion moving the court to issue summons to the respondent in accordance with the prayer of the petition. This motion was denied. The motion of defendants to dismiss the action was sustained.

The judgment of the court is in the following words:

* * * “Thereupon it was ordered that the cause be dismissed at the cost of plaintiff, without prejudice to plaintiff’s rights in the premises, and that defendants have and recover judgment of and from the plaintiff, their proper costs and disbursements to be taxed and let execution issue therefor.”

To reverse this judgment plaintiff prosecutes this appeal.

The foregoing is a statement of the case as presented by appellant. No appearance is entered for the appellees.

This was a proceeding under the "Eminent Domain act," and by this act it is provided that when "petition be presented to a judge during vacation, the judge shall note thereon the day of presentation, and shall also note thereon the day when he will hear the same, and shall order the issuance of summons to each resident defendant, and the publication of notice to each nonresident defendant, and the clerk of the court shall *at once* issue the summons, and give notice accordingly." It is also provided that, "Summons shall be made returnable on such day and hour as the court or judge may fix and determine, not less than thirty days after the issuance of such summons, and the same shall be served in the same manner as in other cases, at least ten days before the return thereof." * * * Mills Ann. Stat. vol. 1, §§ 1717 and 1718.

It is argued that the act seems deficient, in making no provision as to the manner of issuing summons except in cases where a petition is presented to a judge in vacation, and that in the absence of any such provision there can be no doubt of the power of the court to order the issuance of summons upon application.

It may be conceded that it is within the power of the court to direct the summons to issue upon application, but if so the court did not exercise the privilege. We are not willing to admit that the contention of appellant is correct. We will assume that this application was filed in vacation, and if filed in vacation, it should have been presented to the judge. It then became the duty of the judge to note the day of presentation, the day when he would hear the same, and to order the issuance of the summons to the resident defendants and the publication of notice to nonresident defendants. We certainly are justified in taking notice of the fact that the 15th of June, 1887, was not a day within any of the terms of the court provided by statute to be held in the county of Pitkin in that district. The record recites that the petition

was filed in the office of the clerk. After being filed in the office of the clerk it was the bounden duty of the petitioner to present the application to the judge for the purpose of having him comply with the provisions of the statute. Two years or more elapse before any action is taken, and thereupon the court directs a dismissal without prejudice to the petitioners, practically allowing them to institute another proceeding.

The petition as will be observed proceeds upon the theory that Ruedi appears from the record to have purchased from the United States, as a pre-emption claimant, land through which the appellant is seeking the right of way, and that owing to some proceedings or for some reason the entry had been protested and was suspended. It is therefore prayed that in the event of an entry being sustained the petitioner asks the court to cause the compensation to be assessed and to pay the owners of the land the amount they are entitled to. In other words, the petition seeks to postpone the inquiry of compensation until the rights of all the defendants may have been determined. The motion for the summons to issue does not inform the court that the title has been determined that the respective defendants are interested in the adjudication sought by the petitioners. We do not think that the eminent domain act contemplates a proceeding of this kind. *The Colorado M. Ry. Co. v. Croman et al.*, 16 Colo. 381.

By the eminent domain act the petition must set forth the purposes for which the property is sought to be taken, a description of the property, the names of the persons interested therein as owners or otherwise, and praying such judge to cause a compensation to be paid to the owner to be assessed.

The petition in this case is in the alternative. The petitioner prays that, in the event of John Ruedi's entry being sustained the judge of the court will cause compensation to be assessed and paid to the owners of such land and premises. In other words, the petitioner seeks to postpone

the issuance of summons or further action in the case until the rights, title and interest of Ruedi and the other defendants have been adjudicated through the legitimate channels provided for by the government of the United States. Conceding the right to do this, then when it made its motion that the summons issue in conformity with the prayer of the complaint, it should by some supplemental proceeding or petition have indicated to the court that the interests of the defendants had been determined through proper judicial channels, and what such interests were as so determined.

The court had no more ground for issuing the summons upon the application made in 1889, than it had upon the petition filed in 1887.

We think the court below was extremely liberal in its judgment of dismissal in providing that the cause should be "dismissed without prejudice," thus leaving the petitioner in the position to file another petition and renew its prayer for a condemnation of the land through which and over which it sought the right of way.

To follow the argument of the appellant to its logical sequence would result in the right of plaintiff to petition for condemnation of land—the title to which as the record might disclose would be in a number of persons—then in litigation, and to suspend further action in the condemnation proceedings until the title had been determined through the various channels provided by law.

We might readily admit for the purposes of argument that such proceedings could be instituted with such a purpose in view, but when the petitioner seeks for a summons it occurs to us that it was his duty to so amend the petition as to show that the title in controversy had been judicially disposed of in favor of all the defendants.

In the case of *The Colorado M. Ry. Co. v. Croman et al.*, *supra*, it was held that a party cannot be permitted in a proceeding under the eminent domain act to seek a condemnation of certain lands, and at the same time, and in the same suit, and in the same petition, set up a title in fee in itself,

and ask an adjudication upon it. Proceedings in condemnation can only be instituted under the particular statutes which warrant them. The statutes from which the authority to institute them are derived limit the right to certain classes; to wit, those who seek to take property belonging to others for purposes designated in the enactments upon that subject. If the petitioner is unable to bring himself within the *descriptio personæ* of some act from which he derives his rights, or if he fails to show that he is seeking to take private property, and desires to ascertain its value in that proceeding, his petition must be dismissed.

It occurs to us that it was petitioner's duty to so amend its petition as to show who were interested in the premises and proper parties defendant.

The judgment of dismissal was right and warranted by the record and the judgment therefore is affirmed.

Affirmed.

2	209
128	166

MEYER ET AL., APPELLANTS, v. HELLAND, APPELLEE.

ABSTRACTS.

If the appellant fails to file an abstract of the record prepared in substantial compliance with the 16th Rule of Court, his appeal may be dismissed.

Appeal from the County Court of Phillips County.

Messrs. SMITH & MUNTZING, for appellants.

No appearance for appellee.

PER CURIAM. In a primitive way the abstract of record in this case informs us that a summons was issued by a justice of the peace, and returned showing service. Beyond this the abstract is wholly insufficient and in no sense complies with rule 16 of the supreme court of the state of Colorado

and of this court. It does not contain a brief statement of the contents of the pleadings, nor set forth the points of the pleadings or evidence and the points relied upon for the reversal of the judgment or decree. We are, therefore, under the necessity of dismissing the appeal for failure to prosecute and present the same as provided by statute and the rules of the court.

The appeal is dismissed.

Dismissed.

DAVIS ET AL., APPELLANTS, v. GRAHAM, APPELLEE.

1. CONTRIBUTORY NEGLIGENCE.

The return of an experienced miner to the shaft when an explosion was expected to occur, raises a question of contributory negligence on his part which should have been submitted to the jury.

2. SAME.

When a miner, knowing that the means of ascending and descending the shaft in which he is employed are defective and dangerous, continues in the employment after the lapse of a reasonable time for providing safe appliances, he assumes the risk incident to the use of such defective means, notwithstanding he made complaint and was promised that the defect would be remedied promptly.

3. EVIDENCE.

Where the testimony of a witness is discredited by evidence that he has made statements out of court inconsistent with his testimony, it is not competent for the purpose of sustaining him to prove that at other times he made, out of court, statements which are consistent with his testimony.

Appeal from the District Court of Clear Creek County.

Messrs. WELLS, MACON & FURMAN, for appellants.

Messrs. MORRISON & KOHN and Mr. C. C. POST, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

On July 29, 1890, plaintiff, Graham, was in the employ of de-

fendants and was working as a miner in a certain shaft, sunk from the drift at the tunnel level of the Silver Glance lode to the depth of about ninety feet; in the course of such employment it became his duty to drill holes and place and fire cartridges of blasting powder, and to sink said shaft and to run drifts and other workings as he might be directed or expected to do.

It is alleged that defendants failed to maintain in said shaft ladders or other proper contrivances for ascent and descent; that plaintiff had to ascend and descend the said shaft by catching with his feet and hands in the cracks between the timbering of said shaft; that such means of ascent and descent were not a proper contrivance; that on the day and year aforesaid, when plaintiff was working after he had placed the cartridge in a hole drilled by him in the end of said shaft and had fired the fuse to discharge said cartridge, it became the plaintiff's duty and was an ordinary and useful incident to his employment to descend the shaft and see if water had reached said drill hole, and if so to act accordingly; and for this purpose he came down said shaft and was standing about ten feet above the drill hole and above the bottom of the shaft at a point where he was safe from the discharge of the cartridge; that while so standing holding to the cribbing, owing to the want of sufficient ladders or other support, and without negligence on his part, plaintiff fell from said point to the bottom of said shaft at the instant when the blast aforesaid was about to explode and too late to return or take any means to prevent the explosion, or remove himself beyond the effects thereof; and that while plaintiff was at the bottom of the shaft said blast exploded and injured plaintiff; his right eye was destroyed and the sight of his left eye partially destroyed, and plaintiff was wholly blind for about three weeks; the sight of his left eye has never become restored, and plaintiff received other wounds and bruises, and for a long time thereafter suffered great pain and anguish, and has thereby permanently lost the sight of his right eye and the eye itself; the sight of his

left eye has been permanently weakened, and his power to earn a living at his occupation of mining, or any other business, has been much impaired. Wherefore he claims damages in the sum of \$10,000.

Defendants answer and admit that they were in the possession of the mining premises; that the plaintiff was in their employ, and that the duty of the plaintiff in such employment was substantially as in the complaint set forth. They deny that upon the occasion in the complaint mentioned it became and was the duty of the plaintiff to ascend and descend the shaft in the complaint mentioned, for any purpose whatsoever. Admit that he did descend the shaft and was injured by the explosion and confined under medical treatment for a considerable time, and further that the injury occurred to plaintiff solely by his own negligence, without fault of defendants or any of them.

The replication denies that the injuries resulted from negligent conduct or without the fault of defendants.

The cause was tried to a jury and a verdict rendered for plaintiff in the sum of \$1,500. Motion for a new trial overruled, and judgment entered upon the verdict.

The plaintiff testifies that he began working for the defendants on July 29, 1889; that the accident happened on the night of August 11th, about eleven o'clock; that he had been working thirteen and one half days. After he prepared and fired the fuse he went up the cribbing and waited long enough for the explosion, and then went down to about the third line of the timbering, and in going down he looked over the cribbing, put one hand on the hanging wall and saw the fuse was all right, and as he was turning around to go back he swung his hand around to catch hold of the cribbing, but before he got his hand on the cribbing his foot slipped and he dropped to the bottom. "I saw I could not get out and I reached over to get hold of the fuse. I thought I would pull it out before it would explode, but before I got my fingers on it the hole exploded, and filled my face and eyes and both arms full of rock. It felt like sand." He

states that the cribbing was very close at this point, and that caused him to slip. He also testifies that he had made complaint to the defendants about the ladders on the second or third day after he went to work, and that he was informed that they had no ladders and he would have to go down the cribbing; that the cribbing on the top was peeled off and the bark decomposed. It was slippery, all green bark and water coming from the drift. There was a stream in the foot wall above the shaft, and the water came over the cribbing and wet it. He said to Mike: "This is a very slippery place, a dangerous place to work in." He replied: "We are going to put up ladders right away." He spoke to Powell about it and he said they were going to put them in as quick as they could get them; they had sent for the ladders. That he spoke to Welsh about it the first day he went to work, and to Powell two or three days after. He said: "I think there was time to put the ladders in before the accident after I had notified Powell. They have mine ladders for sale in Georgetown. The mine is about four miles from Georgetown. There is a road and a trail. Things are carried over the trail." He further testified that he was an experienced miner, and realized that the shaft was a dangerous place to work in. To use his own language in direct examination he says: "The exact language I used to Mr. Powell was this: 'Sam, this cribbing is bad; this is a very dangerous place, because in getting up and down a man might fall down and break his neck if you don't put ladders in.'" To which Powell replied that he had sent for ladders, and as soon as they come we will put them in.

We deem it unnecessary to quote further from the plaintiff's testimony.

In the course of the trial the defense introduced declarations of plaintiff shortly after the accident, to the effect that it had resulted from his own fault. To use the language of the witness he admitted it was his own fault; he "was just going to take hold of the fuse when it went off." To rebut this alleged admission and others, plaintiff was per-

mitted to introduce declarations of his made at other and different times for the purpose of fortifying or corroborating his testimony at the trial.

The errors assigned are :

First. The court erred in not sustaining defendants' objections to testimony offered by the plaintiff.

Second. The court erred in the instructions to the jury.

Third. The evidence showed that the plaintiff was injured solely on account of his own fault and carelessness, and the verdict is contrary to the evidence and the law.

To sum up the testimony it shows that the plaintiff was in the employ of the defendants ; that he was an experienced miner ; that he realized the dangers incident to his employment by reason of the defendants' having failed to provide the necessary means to ascend from and descend into the shaft ; that he requested that such means be provided ; and that he remained in the employ of the defendants and continued to work in the shaft descending and ascending as his employment necessitated ; that he had charged the mine and taken a position of safety before the explosion. And believing it possible that enough time had elapsed for the fuse to communicate the spark to the charge, he attempted to descend and learn why the explosion had not taken place.

In *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, the supreme court say : " The question of contributory negligence on the part of deceased seems easy of determination. He was in the employ of the defendant ; he was familiar with the premises where he was injured ; he knew the nature of the defendant's business, and that its employees were, according to their usual custom, at the time and place of the accident, engaged in switching and poling cars ; he understood that there was no definite or certain passageway to be left open at the point where he attempted to cross the tracks of the railroad. Under such circumstances, to attempt to pass between cars only twenty inches apart, loaded with his tools and out of sight of the engineer, was a most perilous undertaking ; and we must presume that he was aware of the dan-

ger when he voluntarily undertook the risk. It was broad daylight, and he was acting under no command or direction of any superior. Even if defendant's failure to provide a safe passageway for its employees from one part of the works to another was a neglect of duty, the plaintiff knew of such neglect, and voluntarily remained in the service of the defendant without any promise on its part to remedy the same."

It seems to us the language of the court in this particular case is applicable to the circumstances surrounding the case under discussion, with this exception, that there was in this case evidence of a promise to remedy the existing defects.

We are inclined to the opinion that the plaintiff's attempt to return to the point in the shaft where the explosion was expected to occur, raised a question of negligence on his part which the jury should have been allowed to pass upon. It is true that he thought sufficient time had elapsed, but, as an experienced miner, one who had been in the habit of working in mining shafts, who was experienced in blasting rock, it is fair to assume that he knew that danger lurked around the charge that he had put in and that a return to it in a brief space of time would certainly subject him to the possibility of an explosion and resulting injuries. Still if this be not so, his admissions that he knew of the danger and knew that the employment was hazardous, that injuries were liable to result in the course of his service in one or more ways, and his continuation in such employment for a period of time longer than was necessary to make such employment safe, raised a question of negligence.

Appellee cites the case of *Hough v. R. R. Co.*, 100 U. S. 213, in support of his contention. The circumstances in that case are in no particular similar to those in the one at bar. It is unnecessary for us to review that authority because the supreme court has thoroughly performed that labor in the case of *The District of Columbia v. McElligott*, 117 U. S. 621. The opinion in both cases was rendered by Mr. Justice Harlan.

In the latter case Justice Harlan in reviewing the instructions of the court, which in substance were as follows: That if the jury found that the laborer notified the supervisor of the dangerous condition of the bank he would be relieved from the imputation of negligence during the time necessary to provide a man to watch it, said: "That it was the duty of the laborer having knowledge of the dangerous condition of the bank to exercise diligence and care in protecting himself from harm without regard to any assurance he might have received from the supervisor that the assistance he had asked would be given."

The Eureka Company v. Bass, 8 Southern Reporter, 216, presents the rule as we understand it. In that case a miner charged a hole with dynamite, lighted the fuse and left the mine. The fuse not having exploded he returned after twenty minutes; there was an explosion by which he was killed. The fuse was bad and had frequently hung fire. Six days before the accident the master had promised to get other fuse, and told the miner to do the best he could with what he had. Held, that it was error to refuse the charge that the miner assumed the risk, if knowing the danger, and that the promise to get other fuse had not been kept within a reasonable time, he still continued in the service using the defective fuse.

The court in this case instructed the jury that plaintiff to recover must show that the accident occurred from the fault or negligence of defendants in failing to provide reasonably safe and proper ladders or other means of getting up or down the shaft, and if he stood on the cribbing at a point where he was safe from the shot, and owing to the unsafe condition of the cribbing or want of ladders, fell, and found himself in front of the shot, defendants are liable, but if the plaintiff walked down the shaft and did not fall, but deliberately walked down and tried to pull out or put out the fuse, the plaintiff ought not to recover. This instruction was clearly erroneous. It does not cover the case as detailed in the evidence or the issues as made up by the pleadings, nor is there

any instruction given by the court that remedies this error. The instruction does not attempt to define the liability of the defendants, except in a general way, by saying that if the accident occurred from the fault or neglect of defendants in failing to provide reasonable, safe and proper ladders or other means of getting up or down the shaft he is entitled to recover. Such is not the law. The employment was known to him to be hazardous, and notwithstanding this knowledge he continued in the service of the defendants, and when in a safe position deliberately attempted to return to a point where the explosion was expected to take place, and in so returning fell by reason of the alleged defects mentioned, receiving the injuries for which he seeks to recover. The defendants were certainly entitled to have the facts in the case taken into consideration by the jury.

In the case of *Manufacturing Company v. Morrissey*, 40 Ohio St. 148, it was held, "That the workman's knowledge of the defects in the machine was not, under the circumstances and as a matter of law, conclusive evidence of contributory negligence on his part, but it was a fact in the case to be taken into consideration by the jury, with all the other facts and circumstances, in determining the question whether or not the workman's own negligence contributed to the accident by which he was injured." And certainly we think in this particular case the question of negligence on the part of the plaintiff should have been submitted to the jury by the instruction of the court. But this instruction practically took from their consideration the question of negligence on his part save and except, "unless the jury find from the evidence that plaintiff walked down the shaft and did not fall, but deliberately walked down and tried to pull out or put out the fuse."

It is true that the court instructed the jury that a person who voluntarily exposes himself to danger, which by the exercise of reasonable care and prudence he might have avoided, and is thereby injured, where such want of care on his part contributed to the injury in such a manner that but for his

own fault the injury would not have happened to him, he cannot recover, and that if an employee knows that the materials with which he works are defective; that the employment in which he is engaged is dangerous, and is not induced to remain in the employment by promise on the part of his employer to remedy the defect and remove the danger, but voluntarily remains at his work after knowing of such danger or defects, he is deemed in law to have assumed the risk of such danger or defects and cannot recover for the damages received thereby.

These instructions are certainly inconsistent with the first, and it is difficult for us to determine that the jury did not regard the first and ignore the last. The inconsistency existing between the instructions was well calculated, in our judgment, to mislead the jury. Besides, it does not enlighten the jury as to the time plaintiff could remain in the employment after defendant's promise to remedy the defects. They were entitled to pass upon the question whether a reasonable time had elapsed.

In *Eureka Company v. Bass*, *supra*, it is said: "The employer or servant must be charged with the exercise of ordinary prudence. He is not compellable, nor is it prudent for him to remain in the service of his employer, if by so doing he subjects himself to any extraordinary hazard or peril not incident to the usual mode of conducting the business or employment. If he has notice of any defect in the appliances or instrumentalities used by him, from which injury may be reasonably apprehended, he should, generally speaking, quit the service for his own protection. Notice of the defect merely does not, however, impute to him negligence. He must have notice of the danger, which then becomes a circumstance from which negligence may be inferred, if he continues silently and without objection in the prosecution of his employment."

We now come to the discussion of the admissibility of the plaintiff's declarations subsequent to the accident in corroboration and support of his testimony at the trial, after it had

been established by the defense that he made other and different statements than those made by him while testifying.

We are willing to admit that there is a conflict of authorities upon this point, but we think that the weight of authority is decidedly against the admissibility of such statements.

"By weight of authority, where the testimony of a witness is discredited by evidence that he has made statements out of court inconsistent with his sworn testimony, it is not competent for the purpose of sustaining him to prove that, at other times, he has made, out of court, statements which are consistent with his sworn testimony." Thompson on Trials, § 573, and cases cited.

The record discloses that these statements were made sometime after the accident and after the statements testified to by witnesses on the part of the defense.

We hold that the testimony was inadmissible and for this reason, if for none other, the judgment must be reversed. But we are not content with resting our conclusions entirely upon this one proposition, as we think that the plaintiff's testimony was calculated to establish contributory negligence on his part, and that this question was not properly presented to the jury by the instructions of the court.

The judgment must be reversed.

Reversed.

THE OWL CANON GYPSUM CO. ET AL., APPELLANTS, v.
FERGUSON ET AL., APPELLEES.

1. PRACTICE.

Questions as to misjoinder of parties defendant, not saved by the record, will not be considered on appeal.

2. VERDICT, WHEN CONCLUSIVE.

The court will not interfere with the finding of a jury on any question of fact where it is rendered on conflicting testimony.

3. BROKER'S COMMISSIONS, WHEN EARNED.

When a broker who is employed to sell property finds a purchaser who

220 OWL CANON GYPSUM CO. v. FERGUSON. [April T.,

is ready, willing and able to buy upon the terms specified in the contract of employment, he is entitled to recover his stipulated commissions.

Appeal from the District Court of Arapahoe County.

Mr. H. RIDDELL, for appellants.

Messrs. STUART, MURRAY & ANDREWS, for appellees.

BISSELL, J., delivered the opinion of the court.

In whatever aspect this case is viewed, it seems to have been settled by the verdict of the jury. It appears that in July, 1889, The Gypsum Company was a corporation holding title to some gypsum quarries. Clemons and Graves, Bennett and Bailey owned all the stock. The stock consisted of ten thousand shares of the par value of \$10, and of this, seven thousand had been issued to these parties who held it, and three thousand remained in the treasury of the company. In July, 1889, Ferguson was about to make a trip to Chicago and had negotiations with some of the parties with reference to the sale of a part of the stock at a specified price. The agreement was put in writing, and Ferguson was duly authorized to sell fifteen hundred shares of the stock for a stock consideration. This arrangement is only referred to to enable this case to be understood, since it is conceded that no action was taken under it. What was done by Ferguson subsequently was under another arrangement of August 17th of that year. According to the later agreement, the parties offered to sell three fourths of seven thousand shares of the stock for \$6,000, and give Ferguson \$1,500, for making the sale. The disposition of three fourths of the seven thousand shares carried with it an equal interest in the unissued stock still in the treasury of the company.

For the purposes of the decision this contract will be treated as one entered into on behalf of all the defendants in the suit, and one which bound them all in case its due per-

formance was established. It is quite possible that under some circumstances there would be grave doubt as to the right of the plaintiffs to make all the parties defendants. The appellants cannot assign it for error for it is a matter not saved by the record.

Having disposed of this preliminary question, there is in reality but one inquiry which needs to be considered; did Ferguson as a broker procure a purchaser, ready, able and willing to buy the stock at the price named and on the terms suggested. The jury answered this question in the affirmative. Unless in reaching their conclusion they did it without evidence warranting the result, or in the proceedings there occurred a violation of some well known principle of law, their verdict must be upheld. It is a well established rule that this court will not interfere with the finding of a jury on any question of fact where it is rendered on conflicting testimony.

The duty of a broker is always performed when he finds a purchaser who is willing to take the property on the terms named, and is able to carry out the contract. It seems to be tolerably well settled by the proofs, as well as by the verdict, that Ferguson found such a purchaser in the person of one Dr. Abel. This purchaser was found, and the negotiations with him were completed before any sale had been made by the defendants, and before the expiration of the time limited for Ferguson's performance. It is conceded that according to the terms of the original agreement the trade should have been made prior to September 1st. It is equally true that it was not completed on that date. Ferguson is not barred recovery by this circumstance, since on the 27th of August there was expressly granted to him such time as he might require for the purpose of completing the trade. On the 10th of September a memorandum of an agreement was drafted between Abel and Ferguson with reference to the sale. This is not stated in terms, nor is its substance recited, since the sole inquiry is, did Ferguson find a purchaser able and willing. Undoubtedly Ferguson was without au-

thority to make a written contract with any contemplated purchaser. What he drafted corresponded in all of its essential features with the evident intention, and expressed plans of the vendors, and amounted to an agreement to sell the six thousand shares at the price specified. Neither the mode of payment, nor the time when it should be made was fixed by the original contract between Ferguson and the selling stockholders, nor were either mentioned in that of August 17th. The parties simply described the property as to its acreage, its character and capabilities, and the title which they held. By the written memorandum signed by Abel and Ferguson, certain of the price was to be paid at the inception of the enterprise, and the balance after an inspection of the property and an examination of the title and charter of the company. So long as the original delegation of authority to Ferguson was silent on these points, the law would assume they were all in the contemplation of the parties, and that the payment should not be made prior to the time of the investigation as to all these matters. Whatever was contained in the contract concerning them then may be fairly said to be within the purview of the intention of the sellers. If this is conceded, Ferguson had a right to deal on the basis of sufficient time to determine the truth as to these essentials. But as before stated, the agreement is of no consequence except that it may be looked to on the inquiry whether Ferguson found a purchaser willing to take the property. This fact, however, was otherwise sufficiently and abundantly established by the testimony of Ferguson and Dr. Abel. In the light of it the jury answered this question in favor of the plaintiff, thus entitling him to recover if he had a sufficient contract with the parties. This matter was likewise left to the jury to determine, and upon it their conclusions were with the plaintiff.

There is a good deal of argument in the briefs as to the time when Ferguson sold to Abel, and whether the defendants had not previously bargained the property away as they lawfully might, and thus deprived him of all right to sell.

It is not clear as to the exact date on which information was brought home to the defendants that Ferguson had made the trade. Nor is it clearly established when the deal was made with Posey by which the defendants put it out of their power to carry out the contract with Ferguson's purchaser. Both these dates were within their exact knowledge. They withheld their information, and leave the proof as to them to the presumptions concerning the regularity and certainty of mail and telegraphic communication. They cannot complain if any doubt is resolved against them. Having knowledge they were bound to disclose it. It is tolerably certain, however, that by a letter of the 22d of September Graves and Clemons were informed that Ferguson had completed his deal, and that the parties were shortly coming to Colorado to inspect the property. At the time of the receipt of this letter the property had not been sold to Posey, nor did the parties claim that the property was sold prior to their telegram of September 27th following. In other words it is very certain from the testimony that Graves and Clemons were so far advised of the situation of Ferguson's trade that they had no right to make the sale on their own account unless they did it subject to a liability to Ferguson for the amount of his commissions. It is needless to state the history of the transaction with Posey, or to attempt to decide just when that trade was completed. It is enough that no binding contract had been concluded between the defendants and Posey before they were informed that Ferguson had found a purchaser, that all the needful funds had been subscribed, and the only delay was what was reasonably incident to the coming of the parties to Colorado. It is idle to urge that the vendors were not bound to await the inspection. They had both contemplated and invited it. When they were told that the negotiations between Ferguson and his vendees were substantially concluded, the vendors could not, in the face of this information proceed to negotiate a sale to others.

In the light of the conclusions reached by the court it is wholly unnecessary to discuss the legal effect of the Posey

transaction. In fact, the three fourths were never sold to him. He only bought a part of that interest. The vendors still retained a very considerable share in the property, and were to participate in any profits which might accrue from its development. This certainly would deprive them of the right to set up the sale to defeat the plaintiff's recovery *pro tanto*. It is only referred to as exhibiting the technical and inequitable nature of the defense. Being advised that Ferguson had completed his deal before they made any sale, they could proceed no further save at their peril. The only difference between counsel and the court is, as to the application of this doctrine. The right of the principal to sell his own property at any time prior to any sale to be made by an agent where no exclusive authority is given to the broker, and no time is fixed within which he shall have the absolute right to operate, is tolerably well settled by the authorities. The same cases however hold, that wherever the broker is authorized to sell and he finds a purchaser before any sale is completed by the principal, the latter must account for the promised commissions unless there be something in the contract which relieves him from liability. *Wray v. Carpenter*, 16 Colo. 271.

The question of fact respecting this matter was fairly submitted to the jury under proper instructions. In legal effect the verdict was that Ferguson found a purchaser on the terms nominated prior to the time that any sale was completed by the principals. If this fact be once conceded, the plaintiffs' right to recover cannot be disputed, so long as there is no question concerning the amount of the commissions. *Brand v. Merritt*, 15 Colo. 286.

The case was fairly tried, the verdict of the jury is conclusive, and the record presents no errors on which the case should be reversed, and it will therefore be affirmed.

RICHMOND, P. J., dissenting:

I am unable to concur in the majority opinion of the court.

This action is brought to recover the sum of \$1,500 for alleged services rendered by James L. Ferguson to the appellants, The Owl Canon Gypsum Company, Joseph E. Clemons and Clarence M. Graves.

Two causes of action are set up in the complaint but the second cause of action was substantially abandoned.

In the first cause of action it is alleged that during the months of July, August and September, 1889, Ferguson was employed by the defendants to negotiate the sale of shares of stock in The Owl Canon Gypsum Company for the sum of \$6,000, for which services he was to receive the sum of \$1,500; that in pursuance of the agreement he went to Chicago, Illinois, and effected a sale of the property to one John F. Abel for the sum mentioned. That the purchaser was at the time able and ready to consummate the purchase, but that the defendants had failed to transfer the property or any part of the same in violation of their agreement and refused to pay the sum of \$1,500, as they had agreed. That the claim was duly assigned to appellees, Sarah E. Ferguson and Flora M. Smith for value received.

The defendants answer, denying the employment and allege ignorance of the sale by Ferguson to Abel as well as the ability and willingness of Abel to take and pay for the property.

They aver that Ferguson was, on or about the first day of July, 1889, to visit Chicago on business of his own, and that before he left Denver they authorized him to sell for them a certain number of shares of stock which they held in The Owl Canon Gypsum Company, for the sum of \$6,000, and agreed that in case of a sale they would pay him a reasonable commission or compensation. And further say that they reserved the liberty to at any time make sale of the property or stock on their own account; that on the 10th of September, 1889, they wrote Ferguson that they were negotiating the sale of the stock. On the 22d of September Ferguson replied stating that he had not concluded the sale of the stock and could not do so for sometime, and not until the

parties who contemplated purchasing visited Colorado to inspect the gypsum mine. That before said sale they had not received any notification from Ferguson that he had sold, nor was any demand made from the defendants for the delivery of the stock in pursuance of the alleged agreement, nor was there any tender of money made by Ferguson or Abel, or by any person in their behalf, ever made to them.

The replication denies the allegations in the answer and reaffirms the statements made in the complaint.

The cause was tried to a jury and resulted in a verdict against defendants for the sum of \$1,500.

Motion for a new trial overruled and judgment entered. To reverse this judgment this appeal is prosecuted.

On the trial the following agreement was introduced in evidence:—

“ This agreement, made and entered into this 23d day of July, A. D., 1889, by and between Joseph E. Clemons, and ———Graves, of the first part, and James L. Ferguson, of the second part, witnesseth :

The said party of the second part agreed to negotiate the sale of fifteen hundred shares of The Owl Canon Gypsum Company, shares — par value \$10 per share — at and for the price or sum of \$6,000, said sale to be made on or before September 1, 1889.

In consideration of the above, the said parties of the first part agree that as soon as said 500 shares shall have been sold by said Ferguson, and said stock issued, delivered and paid for, they will deliver to said Ferguson 500 shares of said stock in payment for his service in making such sale or sales.

JOSEPH E. CLEMONS, President.

CLARENCE M. GRAVES, Secretary.

And in addition thereto a letter in words and figures as follows:—

The Windsor Pharmacy, Cor. Eighteenth and Larimer Sts.

DENVER, Colo., August 17, 1889.

JAMES FERGUSON, Esq., Chicago.

Dear Sir:—Your letter of the 14th at hand. We will take

\$6,000 for three fourths of the stock—that is, three fourths of 7000 shares. That will give him a three fourths interest in the reserve stock of 3000 shares; and we will give you \$1,500 for making the sale. You see, we cannot set a price on the other quarter; the gentleman that owns the other quarter is at Fort Collins. Hardly think he would sell. This would give the full control of everything. Hope you will meet with success. Let me hear from you when convenient.

Yours respectfully,

C. M. GRAVES."

Other exhibits were introduced which we do not deem it necessary to recite in full, and to which reference is hereinafter made.

It will be observed from the above agreement that Ferguson agreed to negotiate the sale of 1500 shares of the Owl Canon Gypsum Company for the sum of \$6,000 on or before the first of September, 1889, for which he was to receive as compensation 500 shares of stock, and that Clemons and Graves signed the agreement as president and secretary without designating the name of any corporation either in the body of the instrument or beneath their signatures.

The appointment of Ferguson as agent is but a recapitulation of the agreement. It will also be seen from the letter of August 17th, that Graves evidently wrote for himself and Clemons, agreeing to take \$6,000 for three fourths of the capital stock of the company and to pay \$1,500 for making the sale.

It appears from the evidence that Ferguson, on the 10th September, 1889, entered into a contract of purchase, as the agent and attorney in fact of The Owl Canon Gypsum Company, with one John F. Abel. This agreement is in words and figures as follows:—

"These articles of agreement entered into this 10th day of September, 1889, by and between The Owl Canon Gypsum Company, party of the first part, and John F. Abel, of the second part, witnesseth: That the said party of the first

part, for and in consideration of the sum of \$6,000, to be paid by the said party of the second part in manner hereinafter specified, hereby agrees to sell, assign and set over by good and sufficient deeds and articles in writing three fourths ($\frac{3}{4}$) of all the capital stock of said Owl Canon Gypsum Company, together with all lands, tenements, appurtenances, rights of possession, deeds, patents, certificates of location, affidavits of labor, and all interest in and to the labor, and all interest in and to any of the above, as well as in and to any and all books, papers, accounts and charter of said company, to the extent of a three fourths ($\frac{3}{4}$) interest in each and all of the above, and to the same extent of interest in any and all of the real and personal estate of the said Owl Canon Gypsum Company, to have and to hold the same to his, the said John F. Abel, his heirs and representatives own use and behoof forever.

“ And for and in consideration of the premises aforesaid, the said John F. Abel, for himself, his heirs and representatives, hereby binds himself to pay to the said Owl Canon Gypsum Company the just and full sum of \$6,000, in manner following, to wit: Two hundred dollars at the time of ensembling and delivery of these presents, the receipt of which is hereby acknowledged, \$4,300 at the time, and as soon as the mine or quarry, as well as the charter and title of said company, can be examined by the said Abel (no unreasonable delay to be made by him), and \$1,500 upon the receipt of a patent, or its equivalent, to all the lands of said company, to wit: The gypsum land now claimed by it, and located near Fort Collins, in the state of Colorado; provided, however, that in the event that the agent and attorney in fact of said company, James L. Ferguson, has misrepresented the true condition of said company, and its said land or quarries, then the said \$200 is to be refunded to the said Abel, and the payment of the last two above specified payments shall not be incumbent upon him to be paid, but said John F. Abel or his representatives must make known to said company any misrepresentations, if any there be, on

the part of their said attorney in fact, within five days after having examined the said property aforesaid, or the said \$200 shall be forfeited to said company as and for liquidated damages for breach of contents hereof. It is understood that the foregoing conveyance, or contract for conveyance, upon the fulfillment of the terms hereof by the parties hereto, will vest the said John F. Abel with the ownership of three fourths of 7000 shares of the capital stock of said company, together with a three fourths interest in the reserved or treasury stock of said company, which is 3000 shares, and that the entire capital stock of said company is 10,000 shares, of the par value of \$10 per share.

"To the faithful performance of the contents hereof the parties hereto have bound themselves by their signatures, the day and year above written.

"OWL CANON GYPSUM COMPANY,

"Per JAMES L. FERGUSON,

"Agent and Attorney in Fact.

"JOHN F. ABEL."

Clemons and Graves claim in their testimony that at the time they were negotiating with Ferguson they reserved to themselves the right to negotiate for the sale of their interest at all times. This is fortified by Ferguson in his letter of September 22, 1889, responding to the information by letter and telegram of Clemons and Graves to him, that they were negotiating the sale of their stock. He says: "Of course I do not want to spoil a good deal for you, but do not think it would be advisable for you to get anxious and take less than the price you made me."

The evidence wholly fails to show that Ferguson ever advised, by letter or wire, the defendants that he had entered into any agreement of any kind relative to the sale of the property, or that he had negotiated the sale. Nor does it appear that they contracted to dispose of any property or interest other than their shares of stock in the company. Neither is it shown that they were ever authorized by the company, directly or indirectly, to negotiate a sale of the

stock of the company, or rather ever authorized to enter into any agreement of any kind whereby the company should be bound. Yet, notwithstanding this fact, the verdict was rendered against the company as well as against Clemons and Graves, and the agreement was made between Abel and Ferguson as the agent of the company only.

It is evident that Ferguson, when entering into the agreement in Chicago between himself and Abel, was acting under the letter of August 17th, or it may be admitted was acting under the letter as well as the agreement of July. But he did not negotiate the sale under the agreement, as is evidenced by the documentary proof above quoted. He does not bring suit to recover the compensation nominated in that article, to wit, 500 shares. Instead of selling 1500 shares for \$6,000, he sells, or attempts to sell, three fourths of 7000 shares for the sum of \$6,000, in the name of the Owl Canon Gypsum Company.

In the complaint no contract or agreement is set out showing that the Owl Canon Gypsum Company, by its officers or otherwise, ever consummated an agreement of any kind or character with Ferguson for the sale of any stock or of any other kind of property. Nor does the evidence disclose that the company ever had title to any real estate or gypsum mine. On the contrary, it seems to be admitted by all that the necessary amount of labor and money had not been expended upon the claim to entitle the company or any individual to a patent from the United States government, and that all of the contracts were entered into with the understanding between the parties that an amount of money in addition to what had been expended was necessary to be expended in work upon the mine before such title could be obtained.

It seems almost unnecessary here to more than state that the defendants, Clemons and Graves, could not authorize the sale of any interest in the property of the company, and that the company did not authorize them to act as its agents. Neither was Ferguson ever by any act of the company authorized to enter into any contract of any kind or character

whatsoever in the name of the company. The mere fact that Clemons and Graves signed their names as president and secretary did not establish their right to bind the company or to employ agents to act for the company, nor has the company in any way ratified Ferguson's acts as its agent by availing itself of the fruits of his labor.

The power to bind officers and agents rests, of course, like every other power in the body of the corporators, unless some particular member of the body created or existing within the corporation is legally vested with it.

This being true, it becomes apparent that Ferguson, nor his assigns, had any right to a judgment against the Owl Canon Gypsum Company.

The verdict was against all three of the defendants. The judgment was a joint one and they all join in the appeal to this court.

The rendition of this judgment was certainly error for which it should be reversed if for no other reason.

The entire judgment against several defendants must be reversed as to all, it cannot be reversed as to one and remain as to others. *Streeter et al. v. Marshall S. M. Co.*, 4 Colo. 535; *Gargan et al. v. School District No. 15*, 4 Colo. 54.

But I am not content with disposing of this case solely upon this ground, because I think it equally positive that the plaintiffs were not entitled to recover against Clemons and Graves, for the reason that I am unable to concede that the evidence shows that Ferguson ever procured a purchaser for the shares of stock offered by Clemons and Graves, either in the article of July or the letter of August 17th. What he did procure was an agreement to purchase from the Owl Canon Gypsum Company certain shares of stock and other real and personal interests, leaving in doubt the period in which such purchase should be consummated, and coupled with the additional condition that payment of the \$6,000 should be made at intervals of time conditioned upon an examination of the charter of the mine.

When one seeks to recover for the performance of a con-

tract, he must see that he has performed the contract which is the basis of his action. *Robinson C. M. Co. v. Johnson*, 13 Colo. 258.

This is not a case where the agent produced a purchaser and where the principal refused to sell, but the facts show that the principal sold before the production of the purchaser by the agent to an outside party. Exclusive authority was not given to Ferguson to contract for the sale of the stock. The parties themselves reserved the right, and Ferguson admits that they had the right, to negotiate the sale of the stock pending his offer, and even if this were not so the contract and letters do not give the exclusive right to sell to Ferguson, and therefore the defendants themselves might sell without being liable to him unless they sold to a purchaser procured by him. *Putnam v. How*, 39 Minn. 363; *Fole v. Sherwood*, 41 Minn. 535. .

In order to entitle Ferguson to recover in this case it was necessary first that he should show his authority to act as agent either by previous employment or by acceptance of his agency and the adoption of his acts. Certainly he must show that the agency was the procuring cause of the sale. The obligation he assumed as a condition of his right to demand the sum of \$1,500, was to bring the buyer and seller to an agreement. The authorities substantially concur in support of this rule. "Risk of failure was his; reward would follow success."

It occurs to me that the doctrine announced in the opinion is in conflict with the doctrine of this court in the case of *Babcock v. Merritt*, 1 Colo. Ct. Ap. 84. In that case two rules were invoked in support of the conclusion of the court: First, before the broker can be said to have earned his commission, he must produce a purchaser who is ready, willing and able to purchase the property upon the terms and at a price designated by the principal; second, the broker must be the efficient agent or the procuring cause of the sale. The means employed by him and his efforts must result in

the sale. He must find the purchaser, and the sale must proceed from his efforts acting as broker.

If there is in the entire record in this case a particle of evidence documentary or otherwise tending to bring Ferguson within the principles above recited, I have been unable to find it. He did not procure a purchaser able and willing to buy. The property was sold to the individual with whom he had been contracting or negotiating. And the language of this court in that particular case strikes me as being peculiarly applicable to the situation of the parties as presented by the record in this.

In the case of *Anderson v. Smythe*, 1 Colo. Ct. Ap. 253, this court, by its opinion handed down December 8, 1891, uses this language: "The law is well settled in this state that when an agent produces a purchaser acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, the agent has performed his duty, and is entitled to the commission. The rule is well defined and stated to be that the agent is entitled to commissions where the sale really proceeds and is effected through the acts of the agent, though he did not negotiate the sale. * * * If the agent introduces the purchaser or discloses his name to the seller, and through such introduction and disclosure negotiations are begun, and a sale of the property is effected, the agent is entitled to his commission, although the sale be made by the owner. * * * And cases cited. * * * The latter case carries the doctrine of the right of compensation as far or further than any other case found." The opinion in that case quotes from Church, C. J., and the majority of the court adopted the opinion, in the following language: "A person claiming a commission upon a sale of real estate must show an employment, and that the sale was made by means of his efforts or agency; and, although he employs one or more brokers, he may negotiate and sell the property himself without liability to any one for commissions."

The following is a further quotation from the opinion: "In regard to the correctness of these principles, there can

be no question ; but to render them applicable and available the principal fact must be found,—that the parties were brought together, and the transaction made possible, by the instrumentality of the agent.”

I think I can consistently challenge the production, or the introduction into the opinion of this court in the case at bar, a single circumstance that brings this case within the provisions of the principles last enumerated. In the particular case last above recited the parties were not brought together by the agent, so also in this case. In that case the agent did not inform the defendant that the purchaser was a possible purchaser. To quote further, the court said : “ His commission is earned by finding a single purchaser, ready and willing to enter into a valid contract for the purchase upon the terms fixed by the owner, and, having introduced such a one to the owner as a purchaser, he is not deprived of his right to commission by the owner negotiating the contract himself.” * * * And cases cited.

The court say in that case, that so far as appears, the defendant had no knowledge that Blodgett would be a purchaser upon any terms. I am warranted in asking, did Graves and Clemons or The Owl Canon Gypsum Company in this case have any knowledge that Dr. Abel was willing, and ready to purchase, or was ever introduced as a purchaser ?

I deem it unnecessary to cite further authorities in support of the conclusion here reached, that the judgment rendered against the defendants jointly was clearly error, and that the evidence does not support the verdict. That under the allegations of the complaint and the evidence, plaintiffs were not entitled to recover against either of the defendants.

Recovery must be had on the allegations and not on the proof. *Tucker v. Parks*, 7 Colo. 62; *Miller v. Hallock*, 9 Colo. 551.

The judgment should be reversed.

Affirmed.

BROWN, PLAINTIFF IN ERROR, v. CRAWFORD, FOR THE USE
OF TAYLOR, DEFENDANT IN ERROR.

2	235
s31c	273

1. INSTRUCTIONS MUST BE IN WRITING.

It is error to instruct a jury orally.

2. SAME, ERROR NOT CURED, WHEN.

At the trial objection was made to instructing the jury orally. The court, however, gave oral instructions, but directed the stenographer to note and extend those given. After argument the instructions were extended and signed by the judge. *Held*, that the error was not thereby cured.

Error to the County Court of Arapahoe County.

Messrs. C. E. & F. HERRINGTON, for plaintiff in error.

Mr. GEO. F. DUNKLEE and Mr. O. E. JACKSON, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

This was an action to recover commissions alleged to have been earned by D. G. Taylor, for whose use this suit is brought, in procuring the purchaser for certain real property.

The record discloses that after the production of the testimony and before the argument by the respective parties, the defendant presented written instructions to the court, and at the same time objected to the court instructing the jury orally.

The court proceeded however to instruct the jury, but requested the stenographer of the court to note the instructions given.

At the conclusion of the instructions and before the argument, the defendant again excepted to the instructions as given, because the same were given orally; and excepted to the instructions generally, as well as to the refusal of the court to give the instructions asked by him.

It also appears from the record that after instructing the jury orally, and subsequent to the argument, the instructions as given and taken by the stenographer were extended and signed by the judge.

Subdivision 6 of section 187 of the Code, provides that, "Before the argument is begun, the court shall give such instructions upon the law to the jury as may be necessary, which instructions shall be in writing and signed by the judge." Session Laws 1887, page 156.

In thus giving the instructions we think the court erred and violated the express provisions of the practice act above referred to. The extension of the instructions by the stenographer and the signature of the judge did not cure the error. The language of the Code is that it shall be given in writing before argument, and signed by the judge.

In the case of *Rich v. Lappin*, 43 Kans. 666, it was held that, "The district court must give its instructions to the jury in writing, when requested so to do by either party; and the giving of them orally and having them taken down by a stenographer, and after the jury has retired having them written out by the stenographer, is not sufficient."

In *Rising Sun etc. Co. v. Conway*, 7 Ind. 187, it was held that, "When the court is requested, at the proper time, to give its charge to the jury in writing, the whole charge should be in writing, and should be given literally as it is written." *Laselle v. Wells*, 17 Ind. 33; *T. & W. R. R. Co. v. Daniels*, 21 Ind. 257; 2 Thompson on Trials, § 2376.

Where the statute requires a written charge to the jury it is error for the court not to comply with it, and compels a reversal of the judgment. *The State v. Potter*, 15 Kans. 302.

In the case of the *City of Atchison v. Jansen*, 21 Kans. 560, this doctrine is announced: "The statute provides that the court shall, when requested by either party, reduce its instructions to writing. This provision is mandatory, and a disregard of it is error, compelling a reversal. Hence, when the record contains several pages of instructions, which were given orally to the jury, in disregard of

the demand of one party for written instructions, and some of which are plainly instructions upon the law of the case, and not mere directions as to the form of the verdict or other collateral matters, the court must reverse the judgment irrespective of the question whether such oral instructions as are incorporated into the record, are correct statements of the law applicable to the case."

The foregoing authorities have received the sanction of the supreme court of this state in *Montelius v. Atherton*, 6 Colo. 224; *Lee v. Stahl*, 9 Colo. 208.

For this error alone the judgment of the court below must be reversed.

We do not think it necessary for us to review the testimony in the case, or pass upon the other questions presented by the assignment of errors.

The judgment must be reversed.

Reversed.

THE TRIBUNE PUBLISHING COMPANY, PLAINTIFF IN
ERROR, v. HAMILL, DEFENDANT IN ERROR.

2	237
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1. PLEADING—AMENDMENT.

A complaint which fails to allege the time when the note sued upon is payable may be amended, and unless such amendment is prejudicial to or prevents defendant from interposing a proper defense, a continuance of the cause for the purpose of allowing defendant to amend its answer, will not be granted.

2. SAME.

Courts are liberal in allowing amendments when the cause of action is not changed, and where the complaint fails to state when the note sued on is payable, but the note is overdue, and the maker knows it to be the note he will be called upon to defend against, an amendment whereby the time of payment is inserted, does not change the character of the action.

Error to the District Court of Arapahoe County.

Mr. CHAS. H. TOLL, for plaintiff in error.

Messrs. MORRISON & KOHN, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

Defendant in error, William A. Hamill, instituted this action against the plaintiff in error, The Tribune Publishing Company, upon a promissory note executed on the 21st day of April, 1883, for the sum of \$2,500 with interest at one per cent per month from date until paid. The note sued upon was signed by F. J. V. Skiff as treasurer of The Tribune Publishing Company.

It appears from the record as well as from the argument of counsel that the complaint failed to allege the date when the note was payable, and that upon the trial plaintiff sought to introduce a note executed on the 21st day of April and payable six months after date. To the introduction of the note objections were interposed on the ground that the note sued upon was a demand note, and that the note introduced in evidence was a note due six months after date. Thereupon plaintiff asked leave to amend the complaint and to insert the words "six months after date." To this amendment a most vigorous protest was interposed, but the application to amend was allowed, and defendant asked leave to amend the answer, attorneys insisting that they had entered upon the trial for the purpose of defending a note executed on the 21st day of April for the sum mentioned, on demand. The record also discloses the fact to be that the trial judge said he would allow time to amend the answer, providing the counsel, without formal application by motion, affidavit or otherwise, would state that they had been prejudiced by the amendment and required time to prepare an additional or a different defense. To which counsel for defendant made no satisfactory response, and practically admitted that they knew of the existence of the identical note introduced in evidence and which it was the purpose of the plaintiff to declare upon.

The contest apparently between the parties was whether or not a recovery could be had under the allegations of the

complaint upon a note fully matured, overdue and unpaid, although it was a note due six months after date, yet not so disclosed in the complaint.

Many errors are assigned but none are seriously pressed upon our attention save and except the error of the court in allowing the amendment to the complaint, and under the circumstances, refusing defendant leave to amend the answer.

Plaintiff introduced evidence to show that the note was duly issued in keeping with the custom of the defendant company, and that it was signed by an officer of the company who had been in the habit of issuing its notes and paying the same. The legitimacy of the note and the authority to issue the same is not seriously questioned although raised. The record does not disclose any direct application on the part of the defendant either orally, by affidavit or motion, claiming that the amendment to the complaint seriously prejudiced the company, or in any way prevented the company from interposing a proper defense.

It is admitted that the company knew that a note for the amount mentioned, and of the date, was outstanding. That the attorneys for the company had quietly rested, believing that they could successfully defend against the note as declared upon, although they knew that the omission of the words, six months after date, was a mistake on the part of the counsel preparing the complaint.

It is usually true that courts are more liberal towards defendants in regard to the time when amendments should be allowed, and for the reason that the plaintiff may suffer a nonsuit and bring a new suit, while the defendant would forever lose the benefit of his defense. This rule was applicable at the common law as well as under the present code practice. But the right of amendment was never an absolute one. It was limited by considerations affecting the rights of the plaintiff, and the due administration of law. The application of the rule was not allowed for purposes of delay, nor unless made in good faith and in furtherance of justice. The defendant however, in applying for leave to amend,

must give some reason for his omission, must disclose the amendment he would make, and must show perfect good faith in his application. If, having full knowledge of his defense, he neglects to plead it, or having pleaded withdraws it, especially when he reaps some benefit from the omission or withdrawal, he will not be permitted to re-plead it nor will he be permitted upon the trial to amend by denying a fact admitted in the answer. Bliss on Code Pleading, § 430; *Harrison v. Hastings et al.*, 28 Mo. 346.

The failure of defendant's counsel to respond to the interrogatory of the court to the effect that they had a legitimate defense to the note introduced in evidence, and that the permission to amend by the insertion of the words, six months after date, was prejudicial to such a defense as they expected to prepare, and that they did not appear for the purpose of defending the identical note declared upon, although by mistake certain words as to the date of payment were omitted, brings them within the rule above recited, and justified the court in refusing to continue the cause for the purpose of allowing them to amend their answer.

This brings us then to the consideration of the only remaining question: Was the court warranted by the Code in allowing the amendment?

The action was instituted upon a note executed on the 21st day of April, 1883. The company knew that such a note was outstanding and for the sum mentioned; and at the time of the institution of the suit knew that this was the note which they were called upon to defend. The addition of the words, six months after date, in no way changed the character of the action. The note was overdue and unpaid, and at the time of the institution of the suit was a note that should have been paid upon demand. Consequently we feel justified in saying that there was no such change in the character of the action that would authorize a reversal of the judgment.

Courts will be liberal in allowing amendments when the cause of action is not changed, to the end that cases may be

fully and fairly presented on their merits. *Hayden v. Hayden*, 46 Cal. 332; Bliss on Code Pleading, § 439.

Section 78 of the Code provides that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. If upon the trial of an action before the court or jury, the evidence shall vary from the allegations of the pleadings, and either party is surprised thereby, he shall be allowed, on motion, and showing cause therefor, and on such terms as the court may prescribe, to amend his pleadings to conform to the proofs. Session Laws, 1887, page 117.

This section, without considering other sections relating to amendments of pleadings, was amply sufficient to justify the court in allowing the amendment asked by the plaintiff, and in this connection it will be borne in mind that the defendant introduced no evidence in support of any one of the four defenses set up against the note declared upon in the complaint.

In *Seymour v. Fisher*, 16 Colo. 188, it was held that, The amendment of pleadings during the progress of a trial is, in the exercise of a reasonable discretion, liberally allowed. Such amendments are sometimes permitted after verdict.

In the case of *California Ins. Co. v. Gracey*, 15 Colo. 70, it was held that where a complaint is defective in failing to allege a waiver of a condition in a policy that the loss should not be payable until sixty days after proof thereof, an amendment curing that defect does not state a new cause of action.

This was an action upon an insurance policy which provided that the company should have sixty days after proof of loss to adjust their liabilities and settle with the insured. The amended complaint was defective because it showed suit begun within less than sixty days after proof of loss but did not aver matters constituting a waiver of the sixty day provision of the contract. The second amended complaint cured that defect. The court held that this was not plead-

ing a new cause of action as contended for, it was perfecting the statement of the original cause of action by the addition of essential averments.

This doctrine of amendments as applied in this last cited case is directly applicable to the action at bar.

In the case of *Cooper v. McKeen*, 11 Colo. 41, it was held that the permission given to plaintiff to amend his complaint by alleging a date when the claim sued upon became due, was a matter entirely within the discretion of the court and in harmony with the spirit of the Code. *Horn v. Reiter*, 15 Colo. 316.

We deem it needless to cite further authorities in support of our conclusion. We are clearly of the opinion that the amendment was within the discretion of the court, and that the defendant company, if it desired to amend its answer or set up a different defense from that embraced in the four defenses interposed, should have brought itself within the rule above recited by showing that it had a meritorious defense to the note, and that by the amendment it had been prejudiced, and therefore entitled to time to prepare other and different defenses.

The judgment of the court below must be affirmed.

Affirmed.

2	242
18	321
2	242
18	483

PERKINS ET AL.; PLAINTIFFS IN ERROR, v. PETERSON,
DEFENDANT IN ERROR.

1. EVIDENCE—MINING PARTNERSHIP.

Deeds and contracts between parties, although insufficient in themselves to show a mining partnership, may, nevertheless, be admissible as elements of proof to fix liability upon the parties as partners.

2. MINING PARTNERS, LIABILITY OF.

A mining partnership having existed between the parties, they are legally bound for the debts legitimately contracted by the concern during the time the partnership existed.

3. WRITTEN ASSIGNMENT, WHEN NOT REQUIRED.

The plaintiff being the owner by actual purchase of the claims sued on, need not, in order to recover, show a written assignment thereof.

4. PRACTICE ON APPEAL.

Assignments of error not argued by counsel in their briefs will not be considered by the court.

Error to the County Court of Park County.

Messrs. MONTGOMERY & FROST and Messrs. MARSH & FISHER, for plaintiffs in error.

No appearance for defendant in error.

BISSELL, J., delivered the opinion of the court.

In 1888, A. Bergh was an owner in certain mining claims in the Platte mining district, Park county, Colorado, called the "Colorado No. 1" and "Colorado No. 2." A. H. Estes had some interest in these claims, but the exact extent of it is not apparent from the record. In November, Estes and Bergh made a contract with Perkins, Hart & Co., to transfer to them eleven twenty-fifths of these two properties, for which the grantees were to expend a sum not exceeding \$4,000 for the development of the claims. On the 10th, eleven twenty-fifths of the two properties were deeded to Perkins, Shreve and Hart, who composed the firm of Perkins, Hart & Co. The deed was made in partial performance of a contract of November 1st, which had been previously executed. Subsequently, Perkins, Hart & Co. and Estes and Bergh proceeded to carry out their contracts and to develop the property. According to the terms of the agreement, Estes and Bergh were charged with the duty of supervising and looking after the work, while Perkins, Hart & Co. were to furnish the necessary funds. While all these things perhaps were not specifically expressed in the agreement, whatever else was necessary to the formation of a mining copartnership to develop these claims was by parol agreed to between the parties. In other words, the parties agreed that

the money should be advanced from time to time by Perkins, Hart & Co., as might be required; that Estes and Bergh should supervise the labor, purchase the materials, and devote such time as might be necessary to render the enterprise successful. In pursuance of these arrangements the work progressed. Very considerable supplies were purchased, laborers were hired, and Perkins, Hart & Co. supplied a portion of the money provided for by their agreement. They finally ceased to advance money, and Bergh and Estes paid a part or all of the bills which had accrued, with the exception of some labor accounts. Failing to get the money from Perkins, Hart & Co., an arrangement seems to have been made with Augustus L. Peterson, the defendant in error, to buy these various claims. The complaint avers that they were all assigned and sold to Peterson, who was the real owner, and entitled to maintain a suit if Perkins, Hart & Co. were liable for these expenditures. During the progress of the trial the contract and the deed were offered in evidence, and admitted over the objection of counsel. Proof was made of the written assignment of some of the claims, and evidence was introduced which showed that Peterson had become the purchaser of all the debts, had advanced a large portion of the purchase money, and was obligated for the balance. Counsel objected to the proof, and insisted that it was insufficient to support the recovery. The objection was overruled, and judgment was entered against the plaintiffs in error for \$1,914.95.

The obligation of Perkins, Hart & Co. to pay these bills is so well established by the record that the judgment should not be disturbed unless a grave error has been committed. Their principal contention, that the court erred in admitting the contract and deed in evidence, has no foundation. It is quite true that a recovery could not be had against them on the basis of either of those documents. This conclusion does not determine them to be inadmissible as elements of proof. According to the record, the parties became mining copartners for the purposes of developing the mining claims

which were the subject-matter of the contracts. It is unimportant that that partnership was limited, either in time, in extent, or in its purposes. The copartnership relation was formed, and existed while the work was being done, and when the bills were contracted for labor and supplies. Since this is true, it follows as an unavoidable legal conclusion that Perkins, Hart & Co. are legally bound for the debts legitimately contracted by the concern during the time that the copartnership relation continued. The proof demonstrated that all the bills for which the action was brought were incurred during that time, and contracted by members of the firm, who were authorized by the agreement among themselves to incur the obligations. Under these circumstances it is impossible for Perkins, Hart & Co. to avoid their liability. It is of no avail as an objection that the agreement and the deed were contracts *inter partes*, and that they had nothing to do with the debts involved in the suit. Regardless of the individuals who might be bound by these instruments, it must be true that they would be very important instruments of evidence to determine the relation existing between these four parties, and whether, under all the circumstances, they should be held as copartners in a common enterprise. The evidence was competent for that purpose, and tendered to support a necessary issue in the case, and was properly admitted and construed by the court.

It is somewhat more difficult to dispose of the objection that the plaintiff failed to establish the assignment which he had alleged in his complaint. This might possibly have been a fatal objection, but for the peculiar character of the averment concerning the transfer. The pleader alleged a sale of the various claims to the plaintiff, but did not aver whether they were transferred by an instrument in writing or by parol. No available objection was taken to the pleading in that form, and the inquiry is thus narrowed to the very simple one whether a transfer in writing is essential in order to entitle a plaintiff to recover when he has in reality become the purchaser of the outstanding obligations of a

third person. It was clearly shown by proof that Peterson had bought all these claims, paid a large portion of the purchase price, and become obligated to pay a definite and fixed sum therefor. Under these circumstances, it may well be held that he thereby became the owner, and was therefore entitled to maintain the action without the presence of his assignor. It is quite possible that, if the transfer had been simply for the purposes of collection, his title could not have been maintained; but since he was the owner by actual purchase there is no legal obstacle to his recovery. It simply casts upon the defendants the duty of taking the proper steps to secure the presence of the other parties, if they deem it necessary for their protection. These are the only two errors which are argued by counsel in their brief, and consequently are the only ones considered by the court, or passed upon in this opinion. Since they do not compel the reversal of the judgment, it will be affirmed.

Affirmed.

THE ATLAS LUMBER CO., APPELLANT, v. SCHENCK,
APPELLEE.

PROOF WANTING, JUDGMENT REVERSED.

In an action for goods sold, the defendant set up as a defense that in the purchase he acted merely as the agent of other parties, but on the trial failed to introduce evidence in support of the pleading. *Held*, on appeal from a judgment in his favor, that it should be reversed, and further, that a reversal upon this ground does not violate the familiar rule that this court will not disturb a verdict rendered upon conflicting evidence.

Appeal from the District Court of Logan County.

Mr. S. A. BURKE, Messrs. BENEDICT & PHELPS and Mr. HENRY C. CHARPIOT, for appellant.

Mr. W. L. HAYS, for appellee.

BISSELL, J., delivered the opinion of the court.

This action concerns the purchase price of a lot of lumber said to have been sold by the Atlas Lumber Company to Schenck, the appellee. The complaint contained the requisite averments of an action for goods sold and delivered. While the answers denied the cause of action as stated, the real defense was contained in the affirmative plea that the goods were bought by Schenck as the agent of R. L. and Angie Rowden. It appeared that in the latter part of 1888 and early in 1889, Schenck was building two houses in the town of Sterling, one for himself and the other by contract for the Rowdens. It is unnecessary to state the terms of his agreement with the Rowdens, further than to say that, in general, the contract was to build the house for so much money. It was completed. Before proceeding with the building, Schenck entered into negotiations with the lumber company for the material necessary to the structures. There is no dispute concerning the terms on which he bought the lumber for his own house. The only controversy is as to what was used in building the house for the Rowdens. It is not denied that credit was not asked as to that material, further than it was agreed between Schenck and the lumber company that they should have \$100 out of the first payment, \$300 out of the second, and the balance out of the subsequent payments to be made by Rowden. It was Schenck's contention, as to the Rowdens' supplies, that he acted as their agent; and the sale was in reality made to them, and not to him. Unless the agency be conceded, the recovery cannot be sustained. Schenck entirely failed to support his pleading. He offered no evidence whatever of his agency, nor of any such ratification of his acts by the Rowdens as would make them liable as upon an original appointment. The only dealings which he had with them were those which resulted in the contract to build the house at a certain price. They did not authorize him to purchase materials on their account, nor to transact any business for them or in their

name. In his transactions with the lumber company there was a like absence of all the elements of agency. He bought the materials himself, he did not attempt to make any bargain on behalf of the Rowdens, nor did he have the goods charged to them at the time of their delivery. The only evidence which he offered that in any wise bore upon this proposition was the delivery to the lumber company of orders on the Rowdens for some of the moneys which might become due him under his contract with them. This did not establish an agency, and can hardly be said to have tended in that direction. To reverse the case on this ground does not violate the well-established rule of this court to uphold the verdict of the jury when it is rendered upon conflicting testimony. It is simply a case in which there was no evidence to establish a proposition which must be proved in order to support the defense as pleaded. For these reasons the judgment entered upon the verdict must be reversed, and the cause remanded for a new trial in conformity with this opinion.

Reversed.

CARSON, APPELLANT, v. BAKER, APPELLEE.

BROKER'S COMPENSATION.

A broker is entitled to compensation for his services, when his efforts to bring about a trade, or negotiate a sale of property have been successful, and an alteration of the original terms by, or with the consent of his employer, will not deprive him of his right to compensation.

Appeal from the County Court of Arapahoe County.

Mr. I. E. BARNUM, for appellant.

Messrs. HOYT & BICE, for appellee.

BISSELL, J., delivered the opinion of the court.

Sometime in 1889 Edward Carson was interested in a dairy outfit which had its headquarters at Josephine and 31st streets in the city of Denver. Sometime prior to that date he had listed the property with Baker, the appellee, as a real estate agent, for the purposes of sale at a price named. Baker was not successful in his efforts to sell at that price, and he took out the advertisement which he had inserted in the paper to influence customers, and abandoned the project. Subsequently, and about the time named, Carson reapproached him to renew his efforts at a reduced price. These efforts were not successful. Carson then sought to interest Baker in negotiating a trade of the outfit for some property which belonged to a man named Haynes. The trade which Carson suggested was the exchange of the dairy outfit and property for a small house and some lots which Haynes owned in the vicinity. Carson was willing, however, to pay boot to the extent of a thousand dollars if the trade could be made. At the time he made this proposition to Baker he had a conversation concerning what he would pay if the trade should ultimately be carried out. There is some discrepancy between the statements of the various witnesses as to what transpired when he and Baker concluded their agreement. According to the judgment which was rendered by the county court the trial judge concluded the agreement was that Carson should pay Baker \$100, in case the trade should be consummated. He was fully justified in this conclusion by a fair preponderance of testimony, and his judgment should not be disturbed unless under the facts no legal liability devolved on Carson by reason of the transaction.

This cannot be said to be true. It has been argued with a good deal of force and considerable learning, that in order to entitle a broker to commissions for the sale of property he must produce a purchaser able, ready and willing to buy on the terms nominated when the property is put into his hands. This is true. It is equally true that the broker must be sub-

stantially the moving cause which leads to the sale when he asserts his claim for commission. The present controversy, however, does not involve any such inquiry. The original transaction between the parties undoubtedly contemplated a sale. If that had been the only thing which occurred between them Baker could not recover, since he produced no purchaser able and willing to buy upon the terms given to him. This deal however was subsequently abandoned, and Baker was specifically requested to enter into negotiations with Haynes and endeavor to bring about a trade between Haynes and Carson. His efforts in this direction seem to have been successful. The trade was made, and although the amount of the difference between the two properties was subsequently enlarged by Carson's consent, who gave \$160, and a barn in addition to the thousand which he originally offered to pay, the alteration of the terms of the trade cannot be legally said to deprive Baker of his right to the compensation which Carson undertook to pay for his services. It is rarely in the contemplation of parties who undertake to trade properties, where one is to pay an estimated difference in the relative value of the two, that the trade shall be completed on the terms originally suggested by either. Matters of this sort always proceed by negotiation and mutual concession, and if the properties are ultimately exchanged by the consent of the one who employed the broker, and on terms satisfactory to him, he should not be permitted to escape liability to pay for the services which have been rendered him. In the present case the trade was made satisfactorily to the owner, who put the property in the broker's hands, and the agent did that for which he had been hired, and for which the owner agreed to pay him a specified sum. Since the broker earned his wages, the owner ought not to complain if he is called upon to pay.

The judgment of the county court is in accord with the principles here stated, and since it is supported by the evidence, it must be affirmed.

Affirmed.

**HENDERSON, AUDITOR, ETC., PLAINTIFF IN ERROR, v. THE
COLLIER & CLEVELAND LITHOGRAPHING Co., DEFEND-
ANT IN ERROR.**

2	251
18c	264
2	251
134	125

1. COURT OF APPEALS—CONSTITUTIONAL LAW.

The judgment of this court upon constitutional questions is not con-
clusive, but is subject to review by the supreme court.

2. CONSTITUTIONAL LAW—JOINT RESOLUTIONS.

A mere joint resolution of the senate and house of representatives can-
not empower the secretary of state to create a debt against the
state.

3. SAME.

A joint resolution purporting to authorize the publication of the state
engineer's report for distribution at the state's expense, not having
been presented to the governor for his approval, is not included
within any of the exceptions contained in sec. 39, art. 5, of the Con-
stitution, dispensing with the concurrence of the executive, and is
inoperative.

4. APPROPRIATIONS, HOW MADE.

Appropriations can be made only in the manner prescribed by the con-
stitution. All appropriations for purposes other than the ordinary
expenses of the executive, legislative and judicial departments of
the state, interest on the public debt and for public schools are re-
quired by sec. 32, art. 5 of the Constitution to be by separate bills,
each embracing but one subject.

5. JOINT RESOLUTIONS.

A joint resolution is not a bill within the meaning of the constitution,
neither does its adoption constitute it a law. It would afford no
justification to an officer for the payment of money, since the Con-
stitution, sec. 33, art. 5 prohibits payment except upon appropria-
tions made by law.

Error to the District Court of Arapahoe County.

DEFENDANT in error applied to the district court for a writ
of mandamus commanding plaintiff in error to draw a war-
rant upon the treasurer for the payment of \$3,733.81, alleged
to be due defendant for public printing.

On the 30th day of January, 1891, the following joint
resolution was passed by the state senate, and on the 6th of
February by the house of representatives :

"Be it resolved by the senate, the house of representatives concurring, That three thousand copies of the state engineer's report be printed as prepared, to be by the state engineer distributed among the people of the state."

Said resolution was by the proper officer of the senate delivered to the secretary of state, who, in pursuance of such resolution, entered into a contract with the defendant company to print the same in two parts or volumes, which was satisfactorily done and the volumes delivered. Three thousand copies were printed of near 600 pages. The bill was presented to the state auditor, who declined to issue the warrant, being in doubt of the legality of the debt contracted, and the power of the state legislature to authorize such publication and expenditure by a joint resolution, the learned attorney general contending that such proceedings could only be valid, and the disbursement of public money for such purposes legal, when authorized by a "Bill" and approved by the executive.

Three questions were raised by demurrer in the district court to the petition. The demurrer was sustained and the writ of mandamus allowed, and is assigned as error.

Mr. J. H. MAUPIN, attorney general, and Mr. H. B. BABB, for plaintiff in error.

Messrs. RIDDELL, STARKWEATHER & DIXON, for defendant in error.

REED, J., after stating the facts, delivered the opinion of the court.

The questions of law raised by the demurrer are the only ones to be determined in this court.

This court enters with great reluctance upon the examination of grave constitutional questions, its conclusions not being final, the ultimate determination of them resting, very wisely and properly, in the supreme court. We regret the necessity, cast by law upon us, of an intermediate examination, experimentally. But litigants having a right to invoke

a judgment of this court, we acquiesce in the inevitable, feeling that perhaps the labor of the supreme court may be lessened by this.

Sec. 39, art. 5 of the State Constitution is as follows: "Every order, resolution or vote to which the concurrence of both houses may be necessary, except of the question of adjournment, or relating solely to the transaction of business of the two houses, shall be presented to the governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two thirds of both houses according to the rules and limitations prescribed in cases of a bill."

It will also be necessary in the discussion of the case to refer to sec. 32, art. 5, in regard to appropriations:

"The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject."

The statutory provision in regard to the printing of official reports of state officers is the following:

Session Laws of 1889, § 3, p. 417.—"All officers required by any law of the state to make reports to the governor or legislature, shall deposit the same with the governor on or before the fifteenth of November next preceding the regular session of the general assembly, and it shall be the duty of the secretary of state to place said reports without delay in the hands of the person authorized to do the public printing, for publication, and to superintend the printing of the same and to see that it is done in a proper manner; of each of the reports of said officers there shall be published five hundred (500) copies for the use of the general assembly and the state offices; Provided, That none of said reports shall exceed one hundred and fifty pages."

By sec. 11, p. 374, Sess. Laws of 1889, the state engineer is required to make a report. It is as follows:

“The state engineer shall prepare and render to the governor a full and true report of his work, regarding all matters and duties devolving upon him by virtue of his office, which report shall be delivered at the time when the reports of other state officers are required by law to be made, in order that it may be laid before the general assembly at each regular session thereof.”

The general appropriation bill, Sess. Laws, 1891, p. 33, contains the following clause, deemed by defendant important to be considered in reviewing this case: “For the printing required by the eighth general assembly for the years 1891 and 1892, * * * and any printing required by law or ordered by either branch of general assembly, the sum of \$50,000.”

Practically but one question is presented: Could the legislature by joint resolution, without the concurrence of the executive, order the printing of 3000 copies of a report of 600 pages for general distribution among the people, by the officer making the report, and legally appropriate the sum of near \$4,000 in payment of the same? It cannot be successfully contended that the general assembly derived any power from, or were in any way controlled or restricted by, the statutory provisions above cited. The supreme power of legislation upon all subjects not prohibited by the constitution being vested in such legislative body, any subsequent act would, by implication, repeal any former repugnant act, even if the same was not repealed in terms. Sec. 11 of the act of 1889, creating the office of state engineer and defining his duties, requires him “to render to the *governor* a full and true report of his work, etc., which shall be delivered at the time when the reports of other state officers are required by law to be made, *in order that it may be laid before the general assembly at each regular session thereof.*” The objects of such requirement are plain; first, to inform the executive and legislature in regard to the department; second, to allow the governor to recommend legislation, should the law be found defective, or suggest necessary legislation if recommended by the officer.

It appears that the state engineer had complied with the

requirements of this section; had made his report to the governor; that he had laid it before the general assembly, and after being laid before the general assembly, that body resolved "that 3000 copies, * * * *be printed as prepared, to be, by the state engineer, distributed among the people of the state.*" It will at once be observed that the indebtedness was not created in getting up the report and in getting it before the governor and general assembly, as that had already been done. The governor and general assembly had been fully informed and had derived from such report all the information contemplated by statute and necessary for the transaction of the public business. But when the report has been made as required by law, and has performed all the functions required, and subsequent action taken to print a large number of copies for gratuitous distribution, another and different question is presented, and we are at a loss to see how the right to contract the debt can be predicated upon such statute.

So too, in the act of 1889, § 3, p. 417, "All officers required by law to make reports shall deposit them with the governor on or before the 15th of November next preceding the regular session of the general assembly, and the secretary of state shall without delay have 500 copies of each of said reports printed for the use of the general assembly and the state officers; Provided, That none of said reports shall exceed one hundred and fifty pages."

This, of necessity, precedes the consideration of such reports by the general assembly, and is a limitation and restriction upon the power of the secretary of state as to the expense, unless the same is properly authorized and done under contract. It is apparent that the authority to cause the printing to be done was not conferred by any previous statute, consequently, must depend entirely upon the validity of the joint resolution. It is conceded that the joint resolution was not presented to the governor for his approval. It is obvious that the legislation in question was not embraced in the exceptions mentioned in sec. 39, art. 5, of the Constitution,

hence, was inoperative and invalid, and conferred no authority upon the secretary of state to create the debt. The language of the constitution is so plain and unmistakable, and legislation of the character in question so clearly prohibited that construction of the constitution and the citation of authorities in support of the conclusion above stated are unnecessary and would not be indulged in except for the elaborate and able brief and argument of the defendant in error. It is equally clear that no legal appropriation for the payment of the bill was made by the legislature. If, as contended, there was an intended or attempted appropriation for that purpose, it was invalid,—contravening sec. 32 of art. 5 of the Constitution—by not being made by a separate bill “embracing but one subject.”

Very little support for the positions taken by the defendant can be derived from the action of congress, or the states cited. In some, the constitutions are quite different, and in all the cases where the power to enact by joint resolution has been sustained, it will be found that the subject-matter of the attempted legislation differed materially from that attempted in this instance. Stripped of all its supposed surroundings, it was nothing more nor less than an attempted appropriation of public money for the education and enlightenment of the people. The intention was good; the object praiseworthy; the subjects ably treated in the report, intimately connected with one of the most important industries of the state, hence, of great importance. Perhaps no disposition of the same amount of money in any other direction would have been equally as beneficial, but the mistake was in the attempt to dispose of public money, without the co-operation of a co-ordinate and equally important and responsible branch of government. The exigencies of public business require that limited expenditures for necessary routine work should be within the reach and under the control of the legislative body, and provision is made in the constitution and by statute, but general legislation for the people

of the state, without the concurrence of the executive, is expressly prohibited.

It is expressly declared in sec. 33, art. 5 of the Constitution, "No money shall be paid out of the treasury except upon appropriation made by law," etc.; and by sec. 17, "No law shall be passed except by bill." Aside from the fact that the resolution was not submitted to the governor, it was in no sense a law within the requirements of the constitution. By sec. 18, art. 5, it is said—"The style of the laws of this state shall be"—"Be it enacted by the general assembly of the state of Colorado." The distinctions between a bill and a joint resolution are well defined. In regard to the manner of passage, publication and time of taking effect, they are widely different. It is conceded that it was not a law, and not being a law could not, under the circumstances, create a state debt, nor appropriate money for the purpose intended; and not being a law and the constitution prohibiting the payment of money "except upon appropriations made by law," would afford neither justification nor protection to the officer if the money was paid. In support of these conclusions see Cooley on Const. Lim., 94, 156.

Burritt v. Comrs., 120 Ill. 322, is a case almost indetical with the one under consideration. The provisions of the constitution of that state, construed by the court, are identical in substance with ours and couched in almost the same words. By joint resolution commissioners were authorized to purchase a sufficient number of copies of "Haines Township Organization Laws," to supply seven copies to each organized township in the state, etc.; payment was refused, application made for a mandamus to compel the payment. In an able and carefully considered opinion, it was held, that the proceeding by joint resolution was in direct contravention of the constitution.

See also *May v. Rice*, 91 Ind. 546, where the same questions are presented and discussed, and same conclusions reached. See *People v. Spruance*, 8 Colo. 314.

It is contended for defendant in error that, the secretary

of state being the general purchasing or contracting agent of the state, and having made the contract, which was performed and the benefits received by the state, it was bound to make payment, etc. With this we fully agree. The state is morally if not legally bound to pay, but neither moral nor legal obligation of the state to pay the debt would authorize the officers to pay when not authorized by law, nor would such legal or moral obligation of the state protect the officer in the payment, if such payment was prohibited by the constitution. It is also contended on the part of the defendant in error that, allowing the proceeding to have been irregular and unwarranted, it had subsequently been ratified by the clause above cited from the general appropriation bill, hence, it was the duty of the plaintiff to draw a warrant for it. This contention cannot prevail, for two cogent reasons. First, there is no mention made of the matter, nor any specific intention to ratify it expressed. Second, in our view of the case, if there was an attempted ratification by appropriation of money to pay it, such appropriation was void under sec. 32, art. 5 of the Constitution: "The general appropriation bill *shall embrace nothing* but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt, and for public schools. *All other appropriations shall be made by separate bills, each embracing but one subject.*"

The failure to pay the debt, undoubtedly, works a hardship upon the defendant. It accepted the contract in good faith; with no doubt in regard to its validity, performed its part. No question is made as to price—that it should be paid goes without saying, but public officials are bound by inexorable law in regard to the disposition of public money, and are properly made responsible for all disbursements, and should be protected. Further legislation seems to be needed to provide for the payment of this debt.

The judgment of the district court is reversed. The demurrer should have been sustained.

Reversed.

WINTER, PLAINTIFF IN ERROR, v. GOEBNER, DEFENDANT
IN ERROR.

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1. SPECIFIC PERFORMANCE.

A contract to be specifically enforced must be definite and certain and upon a valuable consideration.

2. CONSIDERATION—SEAL.

A promise against a promise is not, in this class of cases, a good consideration, nor does a seal import a consideration.

Error to the District Court of Chaffee County.

Mr. J. M. LOMERY, for plaintiff in error.

No appearance for defendant in error.

REED, J., delivered the opinion of the court.

The following instrument in writing was made and executed by the parties to this suit:

"This agreement entered into this 22d day of November, 1888, between Robert Goebner of Chaffee County, Colorado, of the first part and W. J. Winter of Arapahoe County, State of Colorado, of the second part, to wit:—

"That party of the first part agrees to bond the following named mining property for two years, at and for the sum of Forty Thousand (40,000) Dollars. Name of the properties: The 'Isis Lode,' 'Lizzie Lode' and 'Lottie Lode,' and also to give a working lease on the above properties for same length of time, holding a one-fifth interest in all net profits accruing from said lease, said mines to be developed for a sale, and all ore taken from said developments to be assorted and shipped as often as profitable and convenient, and that the said Robert Goebner is and will be employed to work on same mines as a miner during such time as the mines are worked. All profits to be divided as soon as received from the mint.

"Signed:

ROBERT GOEBNER, (SEAL.)

W. J. WINTER, (SEAL.)

"Witness T. C. KING."

It is alleged in the complaint that defendant declined or refused to make the bond and lease.

That plaintiff had performed all the conditions of the agreement on his part, and avers his willingness to accept the bond and lease; alleges that the defendant was working the mines and taking out large quantities of valuable ore and appropriating the same to his own use, "and will continue to do so to the great damage of plaintiff unless restrained by injunction." It is also alleged that plaintiff, "relying upon the agreement, has expended one hundred and twenty-five dollars *in and about protecting his rights on the premises,*" and that, by the failure of the defendant to make the bond and lease, plaintiff had been damaged \$5,000.

"Wherefore, plaintiff demands judgment that the defendant be required to make, execute and deliver to the plaintiff a bond for title, with usual conditions, in the sum of Forty Thousand (40,000) Dollars, running two years from date of the order of this court, as the purchase price of said Isis, Lizzie and Lottie Lode Mining Claims, and that he also at the same time be required to make, execute and deliver to the plaintiff a working lease for said premises for and during the life and term of the bond aforesaid, in accordance with the terms of said agreement and upon his failure to so make, execute and deliver said bond and lease in obedience to the order of this court, that the clerk of this court be empowered to make, execute and deliver said bond and lease in lieu of the defendant, and that the plaintiff be put in the possession of said properties by order of this court. The plaintiff prays that a writ of injunction may issue out of and under the seal of this honorable court, directed to the defendant commanding him, his agent, or agents, attorneys or assigns from working said mines and selling or transferring any ore or ores extracted therefrom until the further order from this court.

"Plaintiff demands judgment in the sum of five thousand

(5,000) dollars, as his damages in the premises, and his costs in this behalf expended."

A general demurrer was filed for want of equity, or for want of facts to constitute a cause of action, which was sustained by the court.

The judgment upon the demurrer is the only question presented for determination.

The complaint presents the case in a double aspect; first, as a case in equity for specific performance; second, as an action at law for damages for breach of contract. The contract is not one that can be specifically enforced. It is indefinite and vague.

In Pom. Eq. Juris. § 1405, in treating of a contract, where specific performance will be decreed, it is said: "It must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties and the circumstances under which it was made." See also Fry on Spec. Perform. § 205; *Griffith v. Frederick Co. Bank*, 6 Gill & J. 424; *Morrison v. Barrow*, 1 DeG. F. & J. 638; *Pearce v. Watts*, L. R. 20 Eq. 492; *Allen v. Webb*, 64 Ill. 342; *Munsell v. Lowe*, 21 Mich. 491.

An examination will show its want of definiteness, rendering it incapable of sustaining a decree for specific performance, if not impossible to frame a decree based upon it. There is another insurmountable obstacle in the way of decreeing specific performance going to the validity of the contract sought to be enforced—there is no consideration. Such contracts to be enforced must be upon a valuable consideration. It is the very foundation upon which a decree must be based. 3 Pom. Eq. Juris. § 1405; Fry on Spec. Perform. § 64; *Sheppard v. Sheppard*, 1 Md. Ch. 244; *Butman v. Porter*, 100 Mass. 337.

A promise against a promise is not in this class of cases, as supposed by counsel, a good consideration, nor does the fact that the paper was executed with seals. "A seal does not, for this purpose, import a valuable consideration:" *Jeffreys v. Jeffreys*, Craig & Ph. 138; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Tallmadge v. Wallis*, 11 Wend. 106.

As a complaint at law, it is equally fatally defective; first, for want of consideration, being purely voluntary; second, for want of proper allegations of damage, showing how the damage occurred. A general allegation of damage of \$5,000 is insufficient; and as to the \$125 alleged to have been expended, by reference to the allegation it will be seen that it was not paid to the defendant nor used in improving the property, but "expended * * * in and about protecting his rights on the premises;" hence, could not be a consideration for the contract. It follows that the judgment upon the demurrer was correct.

Affirmed.

METCALF, PLAINTIFF IN ERROR, v. THE PEOPLE, DEFENDANTS IN ERROR.

1. JUSTICES OF THE PEACE—JURISDICTION.

Under sec. 1 of the act of 1885 (p. 372), which provides that all justices of the peace and police magistrates shall have jurisdiction of cases arising under any ordinances passed pursuant to that act, and that the city council, or a board of trustees, may designate one justice of the peace who shall have jurisdiction exclusively, justices of the peace are not divested of jurisdiction in the absence of an act by the town specially conferring exclusive jurisdiction on some particular justice.

2. EVIDENCE—BURDEN OF PROOF.

An objection to the introduction of an ordinance in evidence on the ground that the "ayes and nays had not been called upon its passage," must be supported by the proof of such fact, otherwise the objection will not be sustained.

3. ORDINANCE—CONSTRUCTION OF.

Under an ordinance providing "no person shall engage in quarreling or fighting, nor shall ask, invite or defy any other person to fight or quarrel;" held, that a proprietor of a store had no right to use force to expel from the room one who refused to depart when ordered so to do.

4. SAME.

An ordinance being local, its most authoritative construction should come from local sources, and when more comprehensive than the common law, it cannot be tested by common law rules.

Error to the County Court of Prowers County.

THE facts are sufficiently stated in the opinion of the court.

MR. J. W. METCALF, MR. O. G. HESS and MR. J. C. McCORY, for plaintiff in error.

MR. S. W. JONES, attorney general, and MR. H. RIDDELL, for defendants in error.

REED, J., delivered the opinion of the court.

The plaintiff in error was convicted before a justice of the peace for the violation of a town ordinance, for quarreling with, or for an assault upon, one Haig—appeal taken to the county court—a trial had, resulting in a conviction and fine of \$3.00 and costs. It appears that Lamar, where the trouble occurred, was an organized and incorporated town under the general statutes, and as such had passed ordinances for town government, and had established, or attempted to establish, a police court. It was urged that the justice of the peace, before whom the case was tried, was not the police magistrate or invested with police powers by the town; hence, had no jurisdiction.

This contention cannot prevail. By sec. 1 of the act of 1885, p. 372, "Towns and Cities," it is provided that "Any and all justices of the peace and police magistrates shall have jurisdiction in all cases arising under the provisions of this act of *any ordinance* passed in pursuance thereof, or the city council or board of trustees of any city or town *may designate one justice of the peace who shall have such jurisdiction exclusively.*"

It is stated that a police court had been established, but nowhere stated that such *exclusive* jurisdiction was conferred by the trustees. Such exclusive jurisdiction must have been specially conferred, to the exclusion of other justices of the peace, to divest them of the jurisdiction conferred by the general law. Such fact is not stated, nor is it shown that

any police court existed at the time of such proceeding. We must conclude that the justice of the peace had jurisdiction.

It is also contended in argument that the court erred in allowing the ordinance in evidence upon the trial. Counsel objected on the ground that "the ayes and nays had not been called upon its passage," and the objection was overruled. The statement by counsel was not sufficient. Proof of the fact should have been made. None was offered to impeach its validity, consequently, counsel are not in position to urge such error.

The trouble occurred in the store of the plaintiff in error, who had some wordy disagreement with Haig, and ordered him out of the store. Haig refused to go. After having been ordered out several times, he (Haig) said, "If you want me out, put me out," etc. Thereupon plaintiff in error attempted to strike him and eject him—was unsuccessful, and Haig was removed by the town marshal.

The portion of the ordinance necessary to be considered is "Sec. 1.—No person shall engage in *quarreling* or *fighting*, nor shall ask, invite, or defy any other person to fight or quarrel," etc. There appears to have been a fight or something that might be so construed, and if not, the word "quarrel" is very significant and comprehensive, and a liberal construction of it would, probably, embrace all the transaction. Quarreling was strictly prohibited by the ordinance. People were not allowed to indulge in it, even socially, when invited.

The argument filed by counsel of plaintiff in error is able and exhaustive;—numerous statutory and common law authorities are cited in support of the position that plaintiff in error, having ordered Haig to vacate, and he having declined, he had a right to use force and expel him. Such was unquestionably the law as it used to be administered previous to the passage of the Lamar ordinance, but the ordinance is more comprehensive than the ancient law, and cannot be tested by common law rules. The conviction appears to have been based upon the clause prohibiting quarreling, and could

stand regardless of his common law right to evict him from the premises.

The ordinance was local, and its most authoritative construction should come from local sources. Who could judge of the intention of the legislators? and it having been construed to cover the misunderstanding, and plaintiff in error having been found guilty of an infraction of it, we do not feel at liberty to disturb the judgment. The ordinance may receive a more liberal construction by residents of Lamar than we are prepared to give it, so as to punish want of discretion in a party who would attempt to expel another, without the physical ability to do it.

The judgment should be affirmed.

Affirmed.

FARMERS & MERCHANTS INS. CO., APPELLANT, v. NIXON,
APPELLEE.

1. ASSIGNMENTS OF ERROR NOT CONSIDERED, WHEN.

Assignments of error on admission of testimony, where specific objections to its admissibility were not made nor proper exceptions saved, will not be considered.

2. GENERAL AGENT—WHO IS—EVIDENCE OF.

A person authorized to accept risks, to agree upon and settle the terms of insurance and to carry them into effect by issuing and renewing policies, is regarded as a general agent of the company pending negotiations.

The possession of blank policies and renewal receipts signed by the president and secretary of the company is evidence of such agency.

3. SAME—POWER.

A general agent can waive any condition inserted in the provisions of a policy of insurance.

Appeal from the District Court of Yuma County.

Messrs. MONTGOMERY & FROST, for appellant.

No appearance for appellee.

REED, J., delivered the opinion of the court.

Appellant insured a building used as a hotel, the policy running to appellee. The property was destroyed by fire. Suit was brought to recover the insurance; trial had to a jury; verdict for plaintiff in the sum of \$200 and interest; judgment on the verdict. There was no question in regard to the origin of the fire. An open vessel of gasoline for replenishing the fire was brought in by a servant; it took fire and the building was consumed.

The defense was based upon the fact that a gasoline stove was used in the building for cooking; that by the terms of the policy the use of gasoline was prohibited, and that such use of it rendered the policy void. It was contended by the plaintiff that the use of gasoline was known to the agents of the company who effected the insurance at the time of insuring, and that the provision was waived, and that subsequent agents knew the fact, acquiesced in its use and did not cancel the policy. This was denied by appellant. The testimony was rather conflicting but the jury found the issue for the plaintiff and that is conclusive. Several errors are assigned on the admission of testimony. No specific objections to the admissibility of it were made nor proper exceptions saved; hence, the assignments will not be considered. See *Higgins v. Armstrong*, 9 Colo. 57; *Gilpin v. Gilpin*, 12 Colo. 517; *Ward v. Wilms*, 16 Colo. 86.

It is contended that the court erred in refusing the instructions asked by appellant and in those given.

It is insisted that the local agents had no authority to waive the condition; that if it was waived by the agent, the waiver having been by parol and the policy containing no waiver, that it was inoperative, and that it was error to submit the question to the jury. We do not so regard it.

In May on Ins., sec. 126, it is said: "A person authorized to accept risks, to agree upon and settle the terms of insurance and to carry them into effect by issuing and renewing policies, must be regarded as a general agent of the

company pending negotiations * * * and the possession of blank policies and renewal receipts signed by the president and secretary is evidence of such agency." See *Standard etc. Ins. Co. v. Friedenthal*, 1 Colo. Ap. 5; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 357; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 252.

Authorities are numerous that a general agent can waive any condition inserted in the provisions of a policy of insurance. See *Joliffe v. Ins. Co.*, 39 Wis. 117; *Ins. Co. v. Fennell*, 49 Ill. 180; *Washoe Tool etc. Co. v. Ins. Co.*, 56 N. Y. 613; *Putnam v. Ins. Co.*, 18 Blatch. 368; *Elkins v. Ins. Co.*, 113 Pa. St. 386; *Ball Wagon Co. v. Ins. Co.*, 20 Fed. Rep. 232; *Kings Co. Fire Ins. Co. v. Swigert*, 11 Brad. (Ill.) 590. And such rule seems well founded in reason and justice. The agent should not be allowed to waive a provision in order to secure business, and obtain the money of the insured, and knowing the violation of the provision, acquiesce in it as long as no damage occurs, and when damage accrues, insist upon the provision and the want of authority in the agent to waive it.

The instructions were warranted by the evidence and in accord with the rules above stated, and the issues of fact having been found for the appellee by the jury the judgment is affirmed.

Affirmed.

RICE, APPELLANT, v. GOODWIN, APPELLEE.

1. PRACTICE UNDER THE "TOWN SITE" ACT.

Pleadings and proceedings in actions to determine the right to receive a conveyance under the "Town Site" act are controlled by the chancery practice as modified by that act, and not by the civil code.

2. STATUTORY CONSTRUCTION—REPEALS.

General statutes do not repeal special statutes by implication.

3. SAME.

The "Town Site" act is a special statute, and its provisions relating to practice are not repealed by implication by the civil code, which is general.

4. PRACTICE.

In proceedings under a special statute, any serious departure from its provisions will vitiate them.

5. TOWN SITE PATENT—CONVEYANCE.

When a patent to a town site has been issued to the county judge and his successors, a deed by a commissioner appointed by the municipal authorities passes no title.

6. TOWN SITE—RIGHT OF FIRST OCCUPANT.

It is provided by sec. 15 of the "Town Site Act" (Gen. Stats., sec. 3284), that the person who shall have first acquired the right to the possession or occupancy of the lands in person, by agent, servant or tenant, or those claiming under him, shall be deemed to have the prior and paramount right.

Appeal from the District Court of Pitkin County.

Mr. F. S. Rice and Mr. F. G. SALMON, for appellant.

No appearance for appellee.

REED, J., delivered the opinion of the court.

This was a suit brought by appellee to determine the right to receive a conveyance of an undivided interest in a lot in the town of Aspen, under sec. 14, chap. 108, Gen. Stat., entitled "Town Sites" (1881), in which it is provided: "In case there shall be adverse claimants to such lands, or to any part, parcel or share thereof, either party may bring a suit against the adverse claimant or claimants, in the district court of the judicial district, or in any court of competent jurisdiction in the county in which the lands shall be situated, or in any county to which the county in which such lands shall be situate is attached for judicial purposes: * * * The complaint must show what interest or estate in the lands in controversy the plaintiff claims. The answer, pleadings and other proceedings shall be as in cases in chancery, except

that oral testimony may be introduced upon the trial, and the evidence, if not in the form of depositions, shall be reduced to writing, certified by the judge and filed with the papers in the cause."

The legal title to the town site was by U. S. government patent conveyed to J. W. Dean, county and probate judge, "and to his successors and assigns" in trust "for the several use and benefit of the occupants thereof." At the time of bringing this suit, M. G. Miller was county and probate judge and held the legal title in trust as the successor of the grantee of the U. S. government.

After the issues were made up the case was referred to have the testimony taken and reported to the court, which was done, "certified by the judge and filed with the papers in the case." Upon the hearing plaintiff (appellee) was found entitled to receive a deed to an undivided half of the parcel in controversy, and an appeal taken from such finding.

It is ably contended by appellant that the court erred in allowing a reference and in treating the suit as one in chancery, insisting that by sec. 1 of the Code of Civil Procedure chancery proceedings were abolished, and that by the passage of the revised and amended code of 1887 the statute in regard to the form of the proceeding under the "Town Site" act was repealed; that the trial should have been to a jury. In this contention two or three important facts are overlooked. First, that the code only controls the form of the action, the pleadings, not the nature of the suit and the manner of its determination—equity is not abolished. Second, the "Town Site" act is a special statute. The section of the code referred to was enacted in 1877 and re-enacted in 1887, hence, was the law prior to and at the passage of the "Town Site" act of 1881. It is a well settled rule that general statutes do not repeal special statutes by implication. "The repeal of a special statute, enacted for a special purpose, must be either express, or the manifestation of the legislative intent to repeal must be so clear as to be equivalent to an ex-

press direction." See Sedg. on Stat. & Const. Law, 96-101, and notes.

"*Generalia specialibus non derogant*" is a legal maxim. And see *London etc. v. Limehouse Board etc.*, 3 Kay & John. 123; *Thorpe v. Adams*, Law Rep., 6 C. P. 125; *Burke v. Jeffries*, 20 Iowa, 145; *Crane v. Reeder*, 22 Mich. 322.

It will be observed that as far as form of pleadings was concerned there was a compliance with the code provision, and as to subsequent proceedings, they were required to be under the provisions of the special statutes; any serious departure would have vitiated them. The proceeding appears to have strictly followed the statutory requirements. The testimony was properly taken, "reduced to writing," "certified by the judge," etc. No error was committed in refusing a jury and proceeding to a decree.

It is insisted also that a deed to appellant made by Byron E. Shear vested the title in him and should have been conclusive of the controversy. Mr. Shear was a commissioner appointed by the municipal authorities of the town to administer the trust and make conveyances. The invalidity of such attempted conveyances has been declared by the supreme court in *Mayor of Aspen v. Aspen Town etc. Co.*, 10 Colo. 191., and in *Wheeler v. Wade*, 1 Colo. Ap. 66, and *Webber v. Petty*, 2 Colo. Ap. 63. It was held that the legal title being in the county and probate judge and his successors by the patent of the government, Mr. Shear had no title; hence, could pass none.

By sec. 15 of "Town Site" act it is provided: "And the person or persons who shall have first acquired the right to the possession or occupancy of such lands, either in person, or by agent, servants or tenants, or those claiming under him, her or them, shall be deemed to have the prior and paramount right to such lands."

The evidence clearly establishes the equitable right of appellee to the property claimed, under the provisions and requirements of the statute. The claim of appellant to the property is not such as to very strongly appeal to the con-

science of a chancellor. Letters and facts put in evidence show that to a certain date the title of appellee was recognized and respected by appellant, and an arrangement made for purchasing it, which was not by him carried out, and that then an attempt was made to secure the title by less creditable means. While in proceedings at law, such facts could not control, they must in equity be given proper consideration and influence.

We find no serious error in the record, and that the decree was warranted by the evidence, and should be affirmed.

Affirmed.

THE FIRST NATIONAL BANK OF DENVER, APPELLANT, v.
CAMPBELL, APPELLEE.

1. PRACTICE.

No relief ought to be granted on a case other than the one laid by the pleadings.

2. EVIDENCE—RESULTING TRUST.

Parol evidence is competent to prove a resulting trust. Such a trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee.

3. PROOF, QUANTUM OF.

Unquestionable evidence is required to establish a resulting trust. Whatever is essential to exhibit the equity of the *cestui que trust* must appear in a clear and unclouded light.

4. TRUST DOES NOT RESULT, WHEN.

No trust can ever result to a grantor when his conveyance is made for a colorable, illegal or fraudulent purpose.

5. ATTACHING CREDITOR, RIGHTS OF.

A creditor who causes an attachment to be levied on real estate, without notice of an unrecorded deed by the debtor, is entitled to all the protection afforded an innocent purchaser for value.

Appeal from the District Court of Arapahoe County.

IN 1878 Albert J. Johnson, Tipton, Obey and Porterfield discovered and located the "Sierra Nevada" lode. Johnson

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became the owner of a quarter interest in the claim. This interest remained in Johnson until the 6th of August, 1883, when he deeded it to Peter Campbell, William's brother. This deed was procured to be executed by William Campbell to deprive the federal court of its jurisdiction of a pending litigation with the iron mine. According to his testimony the deed was without consideration. On the 1st of September, 1884, Peter Campbell, by William Campbell his attorney in fact, re-deeded the property to Johnson, to whom, on the 15th of March, 1885, the government issued its patent. Johnson held the title until the 7th of December, 1885, when he executed a deed of this interest to William L. Campbell, which was not recorded until the 13th of September, 1886, nine days after the levy of the attachment in this suit.

February 23, 1883, Johnson made his promissory note to the order of the First National Bank of Denver for \$9,442.10, payable on demand at that bank with interest from date. On the 3d of September, 1886, the bank brought suit against Johnson, and in aid of it sued out an attachment which was levied on the "Sierra Nevada" lode, in California mining district, Lake county. Subsequent to the institution of the suit Johnson died and his administrator was substituted, and the widow and heir at law was made a party. In 1888, William L. Campbell the administrator and the appellee in the present suit intervened, claiming title to the interests which had been seized under the writ.

Messrs. WOLCOTT and VAILE, and Mr. C. J. HUGHES, for appellant.

Messrs. PATTERSON & THOMAS and Mr. CHARLES HARTZELL, for appellee.

BISSELL, J., after stating the case, delivered the opinion of the court.

The whole controversy is as to the priority of the lien obtained by the writ of attachment over the unrecorded deed

made by Johnson to Campbell. To clearly understand the case a somewhat full reference must be made to the testimony. There is a great discrepancy between the allegations of the petition of intervention, the evidence of the intervenor, and the findings of the court. According to the petition "it was expressly agreed between the said Albert Johnson and the petitioner at and before the time of the location of such claim that the interest in the said mining claims should be located in the name of Albert Johnson, but was and should be the property of and belonging to your petitioner." This averment was not supported by proof. Mr. Campbell's testimony substantially was: "Johnson was my agent in 1879. There were no written terms between us. There were no verbal terms. I just furnished him what money he used, and he went around the country from one camp to another as my agent. Q. Were you to take all he got? A. There was no agreement about that; of course if there was any money made I expected to give Albert part of it; what part was not stated. It was to come to me first and I was to make the division. There was no understanding between us, but that was the way we did. It is probable he was active around the property at the time of its location. Q. Did you know he took it in his own name? A. Yes, sir. Q. Was it at your request? A. I don't know as it was. I told him I did not want anything in my name." Campbell testified that he substantially paid all the expenses of the location and development of the property, including the purchase price paid to the government. He states, however, that Johnson may have paid a few dollars, but nothing of any account. Whatever may be the fact concerning the advancement of money to Johnson, it is not shown by Campbell's testimony, or by any other, that the money was devoted to the purposes for which it was supplied. In answer to a question by the court this appears: "Let me ask you a question right there, General Campbell. In the payment of this money for the patenting of the location, for the development, the assessment and the location, did you pay the money yourself to the parties to whom it was

due and payable on account of the work, the assessment and expenses, or did you give it to your partner Mr. Johnson, the defendant, to be paid, and was it paid through his hands?"

A. "Well, I think partly one way and partly the other."

The court: "In other words, did you yourself deal with the men who did the prospecting work, did you deal with the lawyers and others who incurred the expenses of the litigation, yourself?"

A. "I dealt altogether with the lawyers; paid them entirely, and in the other instances, sometimes I paid them, and sometimes I gave him the money to pay."

Campbell testified that they had a good many deals together and that from one of them there was in 1880 a profit realized of upwards of \$30,000, of which Johnson got 50 per cent. He conceded that there was no sort of an agreement between him and Johnson as to what Johnson should receive for what he did, but that he would have received something out of any profits resulting from the enterprise. The court in its findings neither adopts the averments of the petition nor follows the only witness who testified on the subject. The court finds that Campbell advanced the money by which the mine was located and developed; and that the location was made in the name of Johnson "at the suggestion of said intervenor." It will be observed that these two findings neither make the location in Johnson's name the result of an express agreement between Johnson and Campbell prior to the discovery, nor does it make the location by Johnson one made by him as a representative of Campbell.

The conveyances from Johnson to Peter Campbell, from Peter back to Johnson, and from Johnson to William Campbell are shown by William's testimony and found by the court to have been voluntary conveyances without any consideration, and made with the knowledge and consent of William Campbell.

The court finds that at the time of the levy of the writ the bank, which is the appellant, had no notice whatever of the existence or the execution of the deed from Johnson to William Campbell; it further finds that the bank had notice

that the intervenor, William Campbell, had or claimed to have some interest in the mining property, "and had the means and opportunity of inquiring of the intervenor for definite information in respect thereto before making the said levy." The evidence in respect to the notice and the knowledge is substantially as follows: In December, 1883, William Campbell sold D. H. Moffat the "Louisville" mining claim, situate in Lake county. It was shown that Mr. Moffat was then the president of the First National bank of Denver, the plaintiff in this suit. About the time of the Louisville sale Campbell testifies to a conversation which he had with Moffat, wherein he tried to sell him his interest in the Sierra Nevada lode. As he puts it: "Q. Now state what the conversation with reference to the Sierra Nevada interest was between yourself and Mr. Moffat. A. Well it was some little time after that I went to Mr. Moffat and tried to sell him my quarter interest in the Sierra Nevada mine. Q. How long after? A. Well, I cannot tell you exactly, I talked with him two or three times about it and wanted to sell it to him. Q. At or about that time I will ask you if you had a conversation with Mr. Moffat or with Mr. Chaffee in Mr. Moffat's presence concerning this Nevada claim? A. No. I had a conversation with him previous to that. Q. How long previous? A. I think the conversation with Mr. Chaffee at which Mr. Moffat was present happened in the latter part of 1885. Q. Where was it? A. It was in Mr. Chaffee's and Mr. Moffat's room in Denver." In regard to the latter conversation it may be stated that it was one between William Campbell and Mr. Chaffee during negotiations between them for a lease on the property, and that Moffat's knowledge, if any, came from overhearing the conversation which transpired in a room then occupied by all the parties. The dealings, whatever they were which Campbell had with Moffat, were with him individually, and if anything, were offers to sell his interest in the Sierra Nevada mine, and nothing whatever was said in any of the conversations as to the status of the title, or the name in which it stood. The only other evidence on the

subject of notice to the bank was that given by Peter Campbell, the brother of the intervenor, who testifies that in the latter part of 1883, while the Louisville negotiations were pending, he asked Moffat if he was going to buy Will's interest in the Sierra Nevada mine. Peter states that in the course of that conversation he told Moffat that Johnson had no interest in it, and that William owned a quarter of the property. This seems to have been a casual conversation, and it was not had in the transaction of any business in which the bank had any interest, and seems not to have occurred during the pendency of any negotiations with reference to the disposition of the Sierra Nevada claim, or any part of it. There was no other evidence on the subject of notice material to that inquiry.

To establish William Campbell's interest in the claim it was necessary for him to prove the payment of the money to Johnson for the location and development of the property. An agreement between William Campbell and Johnson with reference to the location of the Sierra Nevada mine was never proven. There was no evidence as to the exact terms of any contract between Johnson and Campbell made before the location of the mine. Campbell states Johnson was his agent, going about from one camp to another; but the provisions of the agency are not given, nor is it settled by Campbell's testimony what it was. To establish his title to the interest levied on, he gives evidence that he advanced all the money which Johnson used from 1878 up to 1880, and that he substantially paid all the expenses of working the Sierra Nevada. Johnson does not appear to have been exclusively occupied as Campbell's agent. He was interested with and for other parties, and at various times was shown to have been in possession of considerable money. According to Johnson's own statements which were proven by the intervenor, the interest in the Sierra Nevada mine which he had located was not the sole property of Campbell, but was jointly owned by both those parties. The payments which were made prior to 1882 are not clearly established. It was undoubtedly proven by

Mr. Campbell that he furnished Johnson money when he went to Leadville, and furnished him money from time to time thereafter during the time the work was going on at the location. It was not clearly shown that the money which he gave Johnson went into the property. What disposition Johnson may have made of the funds furnished him by Campbell is largely a matter of conjecture.

The court below held that the deed by Johnson to Campbell was a valid conveyance, and that when the bank levied its writ it might have learned from the intervenor the situation of the title and that therefore it was chargeable with notice of the unrecorded deed and took nothing by the levy. The attachment was dissolved and judgment was entered in favor of the intervenor.

This somewhat complex history clearly outlines the three propositions which must be considered and determined.

First: What title was acquired by Albert Johnson when he located the "Sierra Nevada" lode, and was his title affected by any trust or equitable right in favor of the intervenor Campbell.

Second: If it be demonstrated or conceded, *ex gratia*, that Johnson held the interest charged with an equitable obligation in favor of Campbell, was it discharged of the relation as to the attaching creditor by the subsequent acts of transfer between Johnson, Peter Campbell and William, his brother.

Third: Was the bank legally chargeable with notice of the unrecorded deed from Johnson to William Campbell, or, if without notice, was it possessed of information which would have led to knowledge if due credit had been given it.

The Sierra Nevada mine was located in September, 1879, by Obey, Tipton and Johnson. The location certificate appears to have been filed on the 10th of September, and to have been followed by sundry conveyances between the various locators whereby Johnson's ultimate interest in the property according to the record was one fourth. These are the only facts concerning the title which can be said to be free

from obscurity. No evidence was offered tending to show the circumstances of the performance of the work antecedent to the location, nor in what manner, and by what persons, the subsequent development was done. It is certain that the intervenor was not present at the location, and that he had nothing whatever to do with the supervision of the subsequent work. The locators, Obey, Tipton and Johnson were present and attended to all these matters for several years. These proofs would place an unincumbered title to a one fourth interest in the claim in Albert Johnson. The important inquiry is whether he held the title for the benefit of William L. Campbell and charged with a trust in his favor which the law would enforce as against these attaching creditors.

The equitable interest which the intervenor relies on to support his title against the attachment cannot be upheld. In whatever aspect the case is viewed it lacks some of the essential elements which must always be present to support such a claim.

The averments of the bill respecting the agency are wholly unsupported by the proofs, and the evidence will not uphold the theory of a resulting trust. The intervenor is necessarily thrown back upon his rights under the unrecorded deed from Johnson. His claim under that deed is wholly dependent on the law of notice, and on what the testimony discloses to that point. A very slight reference to the allegations of the pleading filed by Campbell and to the proofs he offered will serve to show the complete departure in the supporting testimony from the case as laid. It was charged that whatever Johnson did was under the express agreement between Johnson and Campbell that the interest "in the mining claim should be located in the name of Albert J. Johnson, but was and should be the property of and belonging to your petitioner." No other significance can be given to this averment than what must always attach to an allegation of an express contract. It is indifferent whether the agreement rest in parol, or is preserved in apt writings which

express the conceded terms of the convention. In either event a definite, determinate, fixed and provable contract must be understood as the expression of the plea. When the case is presented on the trial, it transpires that there was no agreement of any sort. Campbell testifies that he furnished money before, after, and during the time when, as he says, "Johnson was his agent." These statements that Johnson was an agent cannot be taken to define the relation held by Johnson the locator. Whether one is the agent of another cannot be made to depend on the naked declarations of a principal that the other sustained to him that relation. It is a legal deduction to be drawn from competent proof of facts warranting the legal inference. It is clear from this short statement and the evidence before recited that the plea was not sustained by the case. On well settled rules of practice no relief ought to have been granted on a case other than the one laid: *Ford v. Loomis et al.*, 33 Mich. 121.

If a complete departure from such a well settled rule ought to be permitted when a judgment has been entered which is in complete and evident harmony with the rights and equities of the parties, the present case furnishes no foundation which warrants the deviation. There was no express contract between Johnson and Campbell out of which a trust could spring, and by which it was competently proved. None can be said to result from the relation which Johnson and Campbell held to each other, and from what was done by both or either.

The notion of an express trust which our statute requires to be evidenced and proved by a writing can be discarded. What comes under the well recognized and established idea of a resulting trust is alone to be considered. The statute has been so often evaded by judicial construction that this doctrine must be taken as incorporated into the enactment. Nothing is left save to require that what may be called the judicial requisites be present in all their exactness and to their full decided extent.

The familiar illustration of the purchase of property for

the benefit, and with the money of one, while the conveyance of the legal estate is taken in the name of another, furnishes the supposed precedent for the present recovery. In such a case a trust is said to arise by operation of law, and the result is to vest the estate in the party in whose favor the trust is implied. The principle is that the estate is held to belong to him whose money paid for it. Since the nominal grantee parted with none of the consideration and incurred no liability concerning it, he is, as has been well said, "looked upon and in truth is the mere conduit, pipe or channel through which the estate and the title and interest in it pass from the grantor to the real purchaser who pays the consideration for it." These trusts do not come within the prohibition of that statute which declares that trusts concerning lands shall not be created unless by an instrument in writing executed according to the statutory restrictions. Parol evidence to prove the facts from which such a trust will be implied is clearly admissible. Notwithstanding this rule it is equally well settled that there are many limitations to the doctrine. It is not universally true that when the money of one has gone into the purchase of an estate, a trust, enforceable against him who has taken the conveyance of the legal title to himself, will arise, or can be decreed to exist. One thoroughly recognized limitation is, "that the trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself." A like limitation is to be found in the character of the proof requisite to the establishment of the trust. Courts are very exacting in the requirement of unquestionable evidence to establish a resulting trust. Whatever is essential to exhibit the equity of the *cestui que trust* must appear in a clear and unclouded light. The money used must be demonstrated to have been the money of the party claiming the title. It must have been his at the very

time of the purchase, and must have been used for that express object. Its identity must be traceable. Perry on Trusts, vol. 1, § 133, *et seq.*; *Gibson v. Foote*, 40 Miss. 788; *Thompson's App.*, 22 Pa. State, 16; *Dudley v. Bachelder*, 53 Me. 403; *White v. Carpenter*, 2 Paige's Chancery, 217; *Livermore v. Aldrich*, 5 Cush. 431; *Tunnard v. Littell*, 23 N. J. Eq. 264; *Fickett v. Durham*, 109 Mass. 419; *Baker v. Vining*, 30 Me. 121.

Tested by these rules the case now under consideration cannot be brought within the doctrines of resulting trusts, and on that theory the intervenor must fail. No part of the proofs essential to the creation of such an equitable right comes up to the standard fixed by all the authorities. If the agency contended for be conceded, the recovery may not be upheld. There was no evidence that the agent put his principal's money into the location at the time the mining title accrued, nor that any of it went into the work which preceded the location and formed the basis of the title. This is a *sine qua non*—the trust must arise at the time the title is transferred. It is not enough that long before, and for a definite named period, the agent had no funds save what the intervenor furnished. An agreement afterwards to locate, and hold for the loaner, will not do. The money which gets the title must then have come from the claimant. It must be traced into the property and its identity be certain in the changed form. There was no evidence which even tended to prove that what located the claim, provided for the discovery work and antedated the title, was the money of the intervenor. That all subsequent expenses were traceable to him is not of any moment. It neither aids nor retards his recovery. Proof of it was inadmissible unless in some way it was so connected with the prerequisite payments as to tend to substantiate that branch of the case. General evidence that the claimant furnished the purchase money; that the purchaser was impecunious; that so far as the claimant knows the purchaser had no funds save what he was furnished by the *cestui que trust* does not fulfill the requirements as

to the clear, definite, certain application of the *cestui que trust's* money to the acquirement of the legal title resting in the trustee. There was no attempt to show what amount of money was advanced to Johnson at the date of the commencement of the discovery work, what was given him from that time to the filing of the certificate of location, or the completion of the title by the finding of mineral, nor what were the disbursements incident to these things. It is thus impossible by inference, or argument, to find the necessary proof as to the application of the intervenor's money to the procurement of the title. It would violate well settled principles, from which there has never been a well considered deviation, to hold that under the law of trusts an equitable right inured to the intervenor Campbell.

The subsequent transactions between the various parties prevent the application of the law of trusts to support the decree. Johnson held the title to one fourth of the Sierra Nevada lode from the time of its location, September 8, 1879, to the date of his transfer to Peter Campbell, August 6, 1883. Whatever may be the entire history of this transfer, or the motives on Johnson's part which led him to execute the deed, it is sufficient for the purposes of the present inquiry to state the intervenor's story and contention concerning it. It was executed at his request. He is thus bound by whatever legal consequences may attach to it, if he then had an equitable right to the property. The deed was a voluntary conveyance. At its date there was a litigation in prospect with the Iron Mining Company, an owner of the adjacent property. The deed was made solely with reference to the probable suits with that company. The transfer was to avoid the possible jurisdiction of the federal courts which would attach under the law if the title were either in Johnson, or the *cestui que trust*, William L. Campbell. Peter was a resident of the District of Columbia, and any suit between the Iron Mining Company and the thus ostensible owner of the Sierra Nevada could not be brought within the federal jurisdiction. The effect of the transfer was to ren-

der an existing statute inoperative, and was, as being without consideration, an imposition and fraud upon the statute. While it is doubtless true that the deed would have been inoperative for the purpose for which it was intended, if the facts had been learned, it is enough to deprive the intervenor of his right to enforce the trust had it been otherwise sufficiently proven.

An equally insuperable difficulty springs from the later deed from Peter back to Johnson. The title remained in Peter to September 13, 1884. He then became embarrassed. To prevent his creditors from reaching the title which was in him, the property was re-deeded by William, under a power of attorney which he held from Peter, back to Johnson. If Peter took the property discharged of the trust with which it was burdened in Johnson's hands, Johnson retook the title unincumbered by the obligation. He took it unembarrassed by the equity, whether or not this be true, and no trust arose at the time of the conveyance. No money of the intervenors then passed, for it was a voluntary conveyance. By William's consent it was conveyed to Peter, who took it discharged of its obligation, and when it passed to Johnson it was equally free. Besides, since William presumably permitted Peter to claim credit on the faith of his ownership the property might be subject to Peter's debts, and to transfer it to Johnson to avoid the rights of Peter's creditors, which was the declared purpose of that particular transfer, would, under all the cases, relieve the title of any trust which William could enforce in a court of equity. No trust can ever result to a grantor when his conveyance is made for a colorable, illegal or fraudulent purpose. *Perry on Trusts*, vol. 1, § 165; *Miller v. Davis*, 50 Mo. 572; *Tipton v. Powell*, 2 Caldwell, 19; *Ownes v. Ownes*, 23 N. J. Eq. 60.

This disposes of all the questions needful to be considered, save what arises on a consideration of the rights of William L. Campbell as the holder of his unrecorded deed from Johnson, dated December 7, 1885, and recorded some ten days later than the levy of the writ under which the bank claims.

The status of the attaching creditor and of the holder of the unrecorded deed under the statute on conveyances has been settled. The whole question was reviewed and the proper construction of the statute determined in *McMurtrie v. Riddell*, 9 Colo. 497. According to that authority the bank was entitled to all the protection afforded an innocent purchaser for value, and if it was without notice of the deed, that instrument, and the holder of the title under it, must be subject to the claim of the attaching creditor. The bank had no notice of the deed. This could be easily demonstrated by a very slight review of the testimony. It will become apparent from the subsequent discussion, when the means of knowledge and the notice which it is contended legally follows the opportunity, comes to be considered. It is enough to say that on the question of actual notice the finding is against the intervenor. The fifth finding of fact incorporated into the decree expressly states that the bank "had no notice whatever of the existence nor of the execution and delivery of the deed" at the time of the levy. This is conclusive on the matter, for it is most amply sustained by the testimony. Nothing was ever said to any officer of the bank concerning the deed from Johnson to Campbell. It leaves the discussion to proceed on the matter of the means of knowledge, and of the sort of notice which it is contended the bank had. The court found that the bank "had notice that the intervenor had, or claimed to have, some interest in said mining property so levied on, and had the means of *inquiring of the intervenor* for definite information" respecting it before making the levy. There are two difficulties besetting this proposition. The first is, that what is contended to be notice to put the bank on inquiry is not, in the law, notice at all; and the second is, that the finding is wholly unsupported by proof warranting it. The court might be less assertive in attacking this finding on the theory that ordinarily the conclusions of the trial court are held binding on an appellate tribunal, but since in any event the insufficiency of the notice

must be held fatal to the decree, there need be no hesitancy in upsetting what the court did find on that subject.

There has for many years been a great deal of diversity among the courts in determining the effect of notice to an agent, and deciding when the principal will be bound by the knowledge acquired or possessed by his representative. There ought to be a marked difference in the adequacy of the information to put a purchaser on inquiry, and the sufficiency of that which will charge an attaching creditor with notice and be held to bind him. Investigation always preceded the purchase, and none the levy. The situation of the present controversy does not require us to put the case on this ground. It is less liable to criticism, and beyond dispute in this state if it is rested on this ground; the only notice or knowledge proven is that communicated to the plaintiff's agent, or officer, and it was not shown to be present to the agent's mind at the time of the levy, and the circumstances were not such as to bring it presumptively within his recollection at the time of the transaction. The broader cases which hold that the information must come to the agent at the time of the particular transaction, as in *Houseman v. Girard, M. B. & L. Association*, 81 Pa. St. 256, have much in reason and principle to commend them. But the rule first indicated is comprehensive enough to be decisive of this case, and has received the sanction of our own supreme court. *Armstrong v. Abbott*, 11 Colo. 220; *The Distilled Spirits*, 11 Wall. 356.

The deed of Johnson to Campbell was dated December 1, 1885. The levy was in September, 1886. The notice which it is contended was possessed by the bank was obtained by D. H. Moffat, its president, from sundry conversations with William L. and Peter, his brother. The accuracy of their recollection may be conceded and still the case is not brought within the principle. The first statement about the matter was made at the time of the sale of the "Louisville" to Moffat in December, 1883; the next was about the same time and seems, as narrated, to have been a detailed notice by

Peter, as to Johnson's title in a casual conversation about the "Louisville" trade. The only other pretense of notice was in a conversation between Jerome B. Chaffee and William L. Campbell about a lease on the Sierra Nevada, when Moffat was in the room where the conversation happened. He took no part in it, was not concerned in the transaction, and is only said to have heard because he was in the room when it happened. To charge the bank with knowledge obtained by its president while transacting his private business, months and even years before the deed was in existence which conveyed the only title to which the levy could be subordinated, is to carry the doctrine beyond the reason or the declaration of any known decision. Under Lord Hardwicke's rule, and that followed by the courts of this country generally, as Mr. Justice Bradley stated it to be in the *Distilled Spirits* case, the evidence would be incompetent and inadmissible. According to the rule laid down in the *Distilled Spirits* case it cannot be adjudged that the bank was bound by what had been told its president in another transaction in which the bank had no concern. What was communicated to Moffat was evidently neighborly, casual information concerning his friend's affairs, which was more liable to slip from his recollection in twenty-four hours than it was to remain for thirty-six months and be operative to the prejudice of a financial institution of which he happened to be the head. Less weight can be given to what occurred in 1885 in Mr. Chaffee's room than even to this. Moffat was in no sense a party to the conversation. It is not shown that he heard it. It is only as an inference from his presence that the testimony can be said to charge him with the information conveyed by the talk. Such an inference cannot be elevated to the dignity of proof of notice sufficient to affect property rights. There was neither notice, nor anything which in the law can be held to lay on the bank the duty of inquiry. The rights of the attaching creditor must be adjudged superior to those of Campbell under his unrecorded conveyance, and the

decree adjudging the title to be in him free from the lien of the levy is erroneous.

There are other errors assigned and argued which would require consideration if the case had not been reversed on these principal grounds. It was clearly error to permit the intervenor to introduce his books of account relating to transactions long subsequent to the time when the trust was claimed to have been created, and which in no manner tended to support the intervenor's contention respecting the title. The declarations of Johnson concerning the title after the mine had been located, though they strongly tended to support the theory that he had an interest which, if shown, would cast on the intervenor the burden of proving what aliquot part he had paid for, were clearly inadmissible as testimony for the claimant. Further expression of the basis of these conclusions is wholly unnecessary, since the errors are not likely to re-occur on the succeeding trial.

For the reasons expressed, this cause is reversed and remanded for a new trial in conformity with this opinion.

Reversed.

GOMER, PLAINTIFF IN ERROR, v. MCPHEE ET AL., DEFENDANTS IN ERROR.

1. CONTRACTS—PART PERFORMANCE—RECOUPMENT.

A contract providing for the delivery of 1,500,000 feet of lumber to be delivered in lots, monthly, and to be paid for as received, is severable, and failure to deliver all the lumber specified in the contract will not preclude a recovery for the amount actually delivered, but any damage resulting from such failure or occasioned by the breach may be set off or recouped.

2. SAME—SEVERABLE.

It is not the multiplicity of items in a contract which determines its severable or non-severable character, but its object.

Error to the Superior Court of the City of Denver.

THIS is a suit brought upon a contract for the recovery of certain moneys claimed to be due for lumber alleged to have been delivered to the defendants, McPhee & McGinnity.

The cause was tried to the court without a jury and resulted in a judgment of nonsuit against plaintiff.

The complaint sets out the following agreement:

“DENVER, Colo., Oct. 18, '87.

“This agreement made and entered into this 18th day of October, 1887, between M. C. Jackson, of Pine, Colorado, party of the first part, and McPhee & McGinnity, Denver, Colorado, parties of the second part, witnesseth,

“Party of the first part agrees to furnish out of the first lumber manufactured after this date, delivered on cars at Pine Grove, Colo., 1,500,000 feet of good merchantable, sound lumber, yellow pine or red spruce, said lumber to include any lengths or dimensions from twelve feet to twenty-four feet, inclusive, such as may be ordered. In case parties of the second part do not want lumber shipped, party of the first part agrees to pile same at switch in good condition, all so piled shall be received on the first of each month.

“In consideration of the foregoing McPhee and McGinnity agree to pay on the 10th of each month for all lumber delivered at switch or on cars the month previous at the rate of \$13 per M. for common, and \$15 per M. for flooring.

(SEAL) M. C. JACKSON,

(SEAL) MCPHEE & MCGINNITY.”

And it is alleged that under and in pursuance of the terms of the agreement he delivered a certain amount of lumber to the defendants between October 20, 1887, and November 10, 1887, which was accepted and received by the defendants; that the total price and value of the lumber furnished and delivered as agreed upon was \$1,955, of which amount plaintiff avers the sum of \$1,000 had been paid, leaving a balance due of \$955. And that the said M. C. Jackson assigned, sold and transferred the claim herein sued upon to the plaintiff.

To the complaint several defenses are interposed.

1st. A general denial.

2d. A specific denial that the lumber had been furnished in pursuance of the terms of the agreement and that the quantity of lumber claimed to have been delivered had never been delivered, and that the value of the lumber was of the amount of \$1,955.

3d. That under and by virtue of the contract set out in the complaint, M. C. Jackson had contracted to furnish and deliver to the defendants 1,500,000 feet of lumber; that the same must be cut and delivered by him on board the cars at Pine Grove, Colorado, out of the first lumber manufactured by him after the date of the agreement. That he did not complete the agreement, but that under and by virtue of the terms of the contract, Jackson did ship and deliver to defendants certain lumber between the dates in the contract, October 18, and November 10, 1887, which was fully paid for under the terms of the contract.

4th. That they had been garnisheed by the creditors of Jackson and had paid an indebtedness to the amount of \$305.65.

5th. That by reason of the failure of Jackson to fulfill the terms of the contract they had been damaged in the sum of \$1,500, for which sum they claim an offset against the amount sued for by the plaintiff.

Replication was filed to the various defenses, putting in issue all of the new matter therein set up.

Upon the trial plaintiff introduced testimony to maintain the issues on his part:

First—To establish the assignment of the claim.

Second—That by the books of defendants it appeared that between the 19th day of October, 1887, and the 11th day of November of same year, Jackson had furnished and delivered to the defendants on cars at Pine Grove, under the contract in said complaint set out, 139,940 feet of lumber; and that defendants received the same and credited said Jackson with its value under the contract.

Defendants moved for a nonsuit on the ground that the

evidence failed to show that Jackson had completed his contract, or any cause why he had not completed the contract. The court sustained the motion.

The only controversy in this case is whether or not the court erred in sustaining the motion.

Mr. J. W. HORNER, for plaintiff in error.

Messrs. PATTERSON & THOMAS and Mr. CHARLES HARTZELL, for defendants in error.

RICHMOND, P. J., after stating the facts, delivered the opinion of the court.

The record shows that there was a certain amount of money due from the defendants to the plaintiff for lumber furnished by Jackson, received by defendants, and retained by them. We are aware that there is a conflict of authorities relative to the exact question presented for our consideration in this case, and that for the first time this court is arraying itself upon one side of the controversy.

The contract set out and sued upon provides that Jackson is to deliver 1,500,000 feet of good merchantable, sound lumber, yellow pine or spruce, to include any lengths or dimensions from twelve to twenty-four feet inclusive *such as may be ordered*. In case defendants do not want the lumber shipped then the plaintiff was to pile the same at the switch in good condition and all so piled should be received on the first of each month. And on the 10th of each and every month all lumber delivered at the switch or on the cars the previous month was to be paid for at the rate of \$13.00 per thousand and \$15.00 per thousand for flooring.

Let us briefly analyze this contract. By its terms the plaintiff was to furnish out of first lumber manufactured after the date of the agreement to the defendants 1,500,000 feet of the kind specified in lengths and dimensions as the defendants might order.

The lumber was not to be shipped unless the defendant so directed. But if furnished according to the lengths and dimensions directed by the defendants, then without order it was to be piled at the switch on the line of the railroad and to be paid for on the 10th of each and every month.

The query is: Is this a severable or an entire contract? We are fully aware of the fact that the appellate courts of New York and Ohio have arrayed themselves upon the negative side of this proposition. But our investigations lead us to believe that the majority of the state courts as well as the better reasoning support the affirmative of the proposition. If any doubt exists in our mind, it is the result of the conflict of authority.

In *Richards et al. v. Shaw*, 67 Ill. 222, this rule is laid down: "It is a rule, supported by a very respectable weight of modern authority, that, if the vendee of a specific quantity of goods sold under an entire contract receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and the vendee becomes liable to the vendor for the price of such part. But he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfil his contract." The court further remarks that, "Although this rule may be a relaxation of the earlier and more generally received doctrine, that the entire performance, on the part of the vendor, of such a contract as the one in question, is a condition precedent to the payment of price, and the maintenance of an action for its recovery, the rule seems to be a fair and just one, and we are disposed to give it our acquiescence."

In 2 Parsons on Contracts, page 517, the author, after a review of the English authorities, announces the following principle: "If the part to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." * * * But if the consideration to

he paid is not an entirety the contract will be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. This doctrine has been approved in many cases and we conceive it to be the correct presentation of the law. It is not the multiplicity of items in a contract which determines its severable or non-severable character, but it is its object. It has repeatedly been held as will hereafter appear in this opinion, that the effect of a breach of a severable contract may be set off by the defendant and deducted from the damages recovered, as such breach would manifestly give the defendant a right to sue. In other words, as laid down in *Bowker v. Hoyt et al.*, 18 Pick. 555: "If the vendee of a specific quantity of goods sold under an entire contract, receive a part thereof, and retain it after the vendor has refused to deliver the residue, this is a severance of the entirety of the contract, and he becomes liable to the vendor for the price of such part; but he may reduce the vendor's claim by showing that he has sustained damage by the vendor's failure to fulfill his contract."

This doctrine is supported in *Booth v. Tyson*, 15 Vt. 515; *Cole v. Swanston et al.*, 1 Cal. 51; *Evans v. C. R. I. R. R. Co.*, 26 Ill. 189.

It may be said that this is different from preventing a party from recovering at all for work already done, or which he has offered to do under contract, but no one is injured by the rule last recited. The whole intent and purpose of the law as announced by the various courts upon this subject and in favor of the affirmative side of the proposition, is to do exact justice between the parties, and, if the loss occasioned by the partial failure can be recouped by the defendant there can be no conceivable reason for allowing him to escape the performance of his part of the contract in paying for lumber actually delivered, received and retained.

In *Tipton v. Feitner*, 20 N. Y. 423, Judge Denio, in delivering the opinion of the court, said: "The position, that one who has violated a contract on his own part, cannot re-

cover for the breach of any of his stipulations by the other party, cannot be sustained." He then distinguishes cases where the consideration is evidently entire in the mind of the party, and says: "The law no doubt intended to discourage people from breaking their engagements, but this is not generally accomplished by visiting them with a penalty beyond the damages sustained by the party injured."

Here is a contract to deliver a certain number of feet of lumber. The exact amount to be delivered during each and every month, and to be paid for as delivered, is not mentioned, but that a certain amount has been delivered and received and retained by the defendants is evident from the record as at present before us, for which the parties defendant say, we decline to pay because the contract was an entirety and an action for breach would not lie on the part of plaintiff unless he shall show a full and complete performance of his contract, to wit: The delivery of the 1,500,000 feet of lumber. To thus contend is to say that under the contract the defendants were under no obligation to pay monthly for one foot of lumber delivered at any time under the terms of the contract until there had been a complete fulfillment of the contract by Jackson. This we think would be leaving the contract entirely one-sided and placing it in the power of the defendants to say, First. You have not delivered the lumber of the dimensions ordered by us, either at the switch or upon the cars, and if you have delivered the lumber so ordered by us, you have not delivered the entire amount of lumber, to wit: 1,500,000 feet, and notwithstanding that we have not paid you monthly as per our contract for the lumber that you have delivered and we have received and now retain and use, we still say you cannot recover.

We cannot subscribe to such a theory. It is a familiar principle of law that rescissions will not be allowed of the whole contract except where the breach goes to the entire consideration.

Here was an agreement where there were to be successive deliveries, separately and independently paid for, which

agreement it seems to us was complete in itself, and whatever damage such breach does cause the injured party must of course be compensated for, and that is in our judgment all that he can reasonably ask. Contractors will not willfully neglect to carry out their contracts.

The case of *Morgan et al. v. McKee*, 77 Pa. St. 228, was one where the defendant bought 4000 barrels of oil from plaintiff, and eight similar papers of same date were executed by them, each for the delivery of 500 barrels on the last day of consecutive months, payment to be made on each delivery. It was held not to be an entire contract. And Justice Williams, in delivering the opinion says: "It was proposed to show that the contract was entire, when by its very terms, as set out in the offer, it was severable as respects its performance by both parties. The petroleum bought by the defendants was not to be delivered at one time for a single and entire consideration, to be paid when the delivery was complete, but it was deliverable monthly by the plaintiff in specified quantities, and the consideration was apportioned and payable as each delivery was made. The contract therefore was in its very nature severable, and no understanding or agreement of the parties could render it entire so long as its provisions remained unchanged. If it had been entire and not severable, each monthly delivery for which it stipulated could not have been made, as it was, in the papers executed by the parties, the subject of a distinct agreement, as complete in itself as if it had been a separate and independent bargain. If the defendants sustained a heavy loss, as alleged, on each of the four lots of petroleum delivered by the plaintiff, it did not absolve them from their obligation to accept and pay for the residue, if tendered according to the terms of the contract; nor did the plaintiff's failure to make one of the deliveries operate *per se* as a dissolution of the contract and put an end to the rights and obligations of the parties under it. Doubtless it gave the defendants the right to recoup or set off any damages occasioned by the breach, but none were offered to be shown."

We think that the plaintiff was entitled to recover for the full amount of lumber delivered by Jackson to the defendants and unpaid for, and that the defendants are entitled to set off against the claim for which judgment is sought any damage they may have incurred by reason of the failure of Jackson to fulfill his contract.

The judgment must be reversed and the cause remanded.

Reversed.

BUNO ET AL., APPELLANTS, v. GABRIEL, APPELLEE.

1. SETTLEMENT—DUE BILL—PROOF.

Where, in seeking to defeat recovery of the amount of a due bill given in a settlement, defendants failed to state or plead that what they proposed to prove was not known and fully understood by them at the time of settlement and delivery of the bill, such proof is properly rejected.

2. DUE BILL—DEFENSE

To warrant the admission of such testimony defendants must interpose the defense of a breach of contract, and show, or offer to show, that the due bill was executed by them upon a misrepresentation of facts, against which they were not in position to guard themselves.

Appeal from the County Court of Arapahoe County.

Mr. C. M. BICE, for appellants.

Mr. S. M. MORGAN, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

October 15, 1890, O. Buno & Son, appellants herein, entered into a contract with George M. Gabriel, appellee, and one Perdew in words and figures as follows:

“GRANT, Park Co., Colo.

“*Know all men by these presents:* Whereas, O. Buno & Son do this 15th day of October 1890, lease and deliver into the possession of George Gabriel and Robert Perdew one saw

mill for the manufacture of lumber; also three horses and two mules and carts, sleds, and all tools necessary to manufacture said lumber at mill; also blacksmith shop and tools thereunto. Said lumber to be delivered in yard at said mill, for which said O. Buno & Son do agree to pay said Geo. Gabriel and Robt. Perdew five dollars and seventy-five cents per thousand feet. Said Geo. Gabriel and Robt. Perdew do also agree to furnish dinner for each of said Buno & Son's lumber haulers at mill; said Buno & Son do also agree to haul and deliver at mill all freight and supplies for said Geo. Gabriel and Robt. Perdew as pay for said dinner. Said Geo. Gabriel and Robt. Perdew do also agree to do such of said O. Buno & Son's work in blacksmithing and repairing as is within their ability at said shop. Said O. Buno & Son also agree to furnish all necessary supplies for said blacksmith shop.

"Said Geo. Gabriel and Robt. Perdew do also agree to use due care and caution with said property. Said property to be delivered to said O. Buno & Son April 15, 1891.

O. BUNO & SON,

Per W. BUNO.

GEORGE M. GABRIEL,

R. L. PERDEW.

Witnesses:

C. O. DELINE,

F. RUTHERFORD."

Thereafter they had a settlement which resulted in the execution and delivery of a due bill to Gabriel for the sum of two hundred dollars and ninety-six cents, which due bill was the basis of this action.

Proceedings were originally instituted before a justice of the peace where judgment was rendered for plaintiff. Appeal was taken to the county court and upon trial resulted in a judgment in the same sum, for plaintiff, to reverse which this appeal is prosecuted.

During the progress of the trial appellants sought to prove that Gabriel had neglected to comply with the pro-

visions of the contract, but in their offer they failed to state that all the matters and things which they proposed to prove in order to defeat recovery were not known and fully understood by them at the time the settlement was made and the due bill executed and delivered. This proof was excluded and we think properly so. Defendants also offered to prove that in the course of their business with the plaintiff he had constructed a certain road for which he charged the sum of \$140, and that said road did not cost to exceed the sum of \$30.00. This offer of proof was excluded.

All that the defendants offered to prove would not constitute a defense to plaintiff's right of recovery. It is said that Gabriel put in a claim of \$140 for building the road, and represented that he had built the road of certain dimensions and of certain length, and that it cost him much time, labor and expense, for which he was allowed \$140; that Buno relying on this representation allowed him the sum of \$140, but that upon examination Buno found that the representations were entirely false; that the whole expense and labor for building the road did not amount to more than \$30.00. This may be true and still the plaintiff be entitled to recover, as the estimate of the defendants of its probable cost could not in any sense be allowed to establish the compensation which Gabriel was really entitled to recover for his time, services, and expenditures in its construction. The abstract is very meager and wholly insufficient to permit of our considering the matters urged upon our attention upon oral argument.

It occurs to us that in order to have warranted the court in admitting the testimony the defendants were obligated to interpose the defense of a breach of contract and to show affirmatively, or offer to show, that the due bill was executed by the defendants upon a misrepresentation of facts and against which they were not in a position to guard themselves.

No error appearing in the record warranting a reversal the judgment must be affirmed.

Affirmed.

HILLSBURG, APPELLANT, v. HARRISON, APPELLEE.**1. MECHANICS' LIEN.**

A mechanic who, under contract, bestows labor upon a chattel for its improvement is entitled to retain the possession thereof until he has been paid for his services, but performance of the contract is essential to the creation of the lien and the existence of the right of improvement.

2. MECHANIC—WHO IS.

A tailor to whom cloth has been delivered to be made into garments is a mechanic.

3. REPLEVIN—WHEN IT LIES.

Coats made by defendant of cloth furnished by plaintiff for that purpose cannot be replevied before completion of the garments, where the evidence fails to show that the defendant violated his contract, or that plaintiff paid or tendered defendant's wages.

4. CUSTOM.

If there was a custom among merchant tailors and their employees requiring the latter to return garments for inspection before receiving compensation for their labor, the presumption obtains that the contract of employment was entered into with reference to it. Such a custom is reasonable and in no wise interferes with the lien of the mechanics.

Appeal from the County Court of Arapahoe County.

Mr. W. W. COOK, for appellant.

Mr. S. S. ABBOTT, for appellee.

BISSELL, J., delivered the opinion of the court.

This suit is about two coats and the right of a tailor to assert a lien for the contract price of making them. Ever since the representatives of the craft assembled in Tooley street, the deliberations of the trade have attracted world-wide attention, and the solution of their disputes have required the application and settlement of the gravest and most complicated doctrines. The present is no exception to the gen-

eral course of history. The peculiar circumstances and proven facts of this difficulty seem to require a novel application of possibly familiar and thoroughly settled rules of law, since the books are barren of exact precedents which admit of easy adjustment to the controversy. One monument more will not add to the luster and immortality of their name, but it may prove a "foot-print" to point out the way to less fortunate toilers in other fields of labor. The litigation cannot be wholly ended by this decision. The record lacks the fullness of testimony essential to a complete determination of their differences, for the case was not tried on such a close perception of the settled law of the lien secured to the mechanic as to develop everything necessary to an accurate ascertainment of the rights of the parties. So far as may be, the principles by which the claims of the litigants must be ultimately measured will be set down.

Some time in the year 1891 Louis Harrison, the appellee, was a merchant tailor doing business in the city of Denver. At that time the appellant Hillsburg was a tailor working at his trade in the city and in the employ of the merchant Harrison. For a time which it is unimportant to state, Hillsburg worked in the shop belonging to his employer, but when the present trouble arose he was working at his home on materials which were cut and furnished him to turn into complete garments. Whether there was a distinct arrangement that the tailor should do the particular work over which the dispute arose at his house it is unnecessary to determine. It is sufficient to say that the record discloses the fact that the tailor took the work home with the knowledge and permission of the employer. He took two coats; one an overcoat and the other a cutaway, for the making of which he was to receive \$26.00, being \$12.00 for the one, and \$14.00 for the other. It was not shown that there was anything said as to the time within which the coats should be finished, nor was there any proof offered as to the length of time the tailor kept the goods, and whether it was a reasonable or an unreasonable period for him to occupy in making them.

This occasions one difficulty in deciding the case. Some time after the goods were taken away the merchant sent one of his employees to the house after the garments, but the tailor refused to deliver them, and claimed to hold them for the sum that would be due him when the coats were completed. They were not finished when they were sent for, and it is fairly deducible from the record that they were unfinished at the time they were seized under the writ of replevin issued in the present suit. The employer seems to have done nothing but demand the goods. He made no tender of the value of the labor done, but assumed that he had a right to resume possession without regard to the claims of the workman. The merchant offered some proof which may be fairly said to show the existence of an universal custom among tailors to require the production of the finished garment at the store, and its submission to the cutter or the proprietor to determine the character of the work, and whether the performance is in accordance with the contract. The merchant offered proof tending to show that the garments were worth \$105, \$50.00, and \$55.00, respectively, and that by reason of the delay in supplying the garments to his customers he had lost the sale and been damaged substantially in their total value. The court entered judgment giving him possession and assessing his damages at \$50.00.

It is impossible on this record to determine whether the merchant is entitled to recover, or the tailor to hold the goods until the contract price is paid. The most that can be done is to hold that on his proofs the merchant was not entitled to judgment. Some of the questions discussed by counsel are unimportant to decide in the view which the court takes of the law. The tailor was a mechanic and entitled to hold possession of the garments until the price of the labor which he had put on them for their betterment was paid by the employer if he fulfilled his contract. This was true at the common law and is true under the statute. With respect to this class of artisans the statute is but declaratory of the common law save as to the machinery which it pro-

vides for the enforcement of the lien. If it is conceded that the mechanic was in the rightful possession of the goods under a contract to bestow labor on them, his right to a lien for the price of that work is an inevitable deduction. The only trouble is that at the time the suit was brought the garments were not finished. This fact of itself would not destroy his right to the lien, nor his right to maintain the possession essential to its assertion and establishment, providing there was no failure to perform according to the terms of a specific agreement between the parties, or a failure to do the work within a time which was reasonable under the circumstances. Performance of the contract is undoubtedly essential to the creation of a lien and the existence of the right of enforcement. It might possibly be that a failure on the part of the tailor to finish the garments within a reasonable time would deprive his employer of the sale of the goods and subject him to great damage. It would not then be consistent with the theory on which the right of lien rests to permit the artisan to hold the goods and compel the payment of the wages which ought in law and equity to become due only on full performance. There would be neither law nor equity in compelling the employer to part with his money in order to gain possession of that which he owned, and force him to resort to a fruitless suit against the mechanic to recover the damages which he had sustained. On the other hand it is equally true that the merchant cannot maintain an action for the possession of the property without establishing one of three things. First, he may maintain the suit provided he show a performance of the contract and the payment of the amount due under it. Second, the same result can be arrived at if he shows a tender of the sum found on the trial to be due to the artisan, provided he keeps his tender good under the law by bringing his money into court, even though the artisan may wholly refuse to take it, claiming some other sum; the only condition being that if the employer relies upon the tender there is cast upon him the duty of making it timely and sufficient. Third, assuming

all other proofs to be sufficiently made, he may maintain the action if he show a failure on the part of the workman to do that for which he has contracted. It was not possible at the common law, neither is it under the statute, for the workman to refuse to perform his contract according to its terms, and insist on retaining possession in the enforcement of his claimed lien as against the superior right of the owner of the goods. No such rule has ever been established: *Hodgdon v. Waldran, et al.*, 9 N. H. 66; *Hilger v. Edwards*, 5 Nev. 84; *Munson v. Porter*, 63 Ia. 453; *Bloom v. McGehee*, 38 Ark. 329; *Scarfe v. Morgan*, 4 M. & W. 270; *Hall v. Tittabawassee Boom Co.*, 51 Mich. 877; Jones on Lines, vol. 1, §§ 589-1025, 1029.

The employer wholly failed to bring himself within the scope of any one of the three rules above laid down. He neither paid the bill, made any tender, nor showed any failure to perform according to the terms of any contract which he had with the employee. He could not then be entitled to a judgment giving him possession.

The employee is somewhat similarly circumstanced, and he is not entitled to an affirmative judgment, declaring that he had a lien which he might maintain as against the employer. This comes because he failed to show that he had performed his contract, or that the time within which the contract might be performed had not yet elapsed. Undoubtedly under the evidence judgment should have gone against the plaintiff and left the tailor in possession, since his original holding was rightful, and the employer failed to make the proof essential to sustain the right of possession in him.

It has been quite strongly urged in the briefs that the court erred in admitting proof of the custom prevalent among merchant tailors and their employees, to require workmen to return garments for inspection before they receive compensation for their labor. It is insisted that that custom destroys the common law and statutory right of lien which mechanics have who do work on personal property which is rightfully in their possession. The force of the

contention is not apparent. If the custom is an universal one, as it seems to be according to the evidence, the contract was presumably entered into with reference to it. It in no-wise interferes with the lien of the mechanic, or prevents the assertion of his rights, and is but a reasonable regulation permitting the employer to inspect the work to see if the performance is according to the contract before he parts with the price of it. To produce the work in the shop for the inspection of either the cutter or the proprietor would in no-wise affect the lien or the employee's right to it, for there would be no such unconditional surrender of possession as would be necessary to destroy the lienor's rights. If the employee was wrongfully refused the right to resume his possession after the inspection, in case the employer insisted the work was not according to contract, he would not be remediless, but his right of possession would be amply protected in a proper action therefor.

Doubtless upon the succeeding trial the facts which are essential to a complete determination of this controversy will be brought before the court which will be able to render the proper judgment in the light of the principles herein laid down.

For the error committed in the entry of the judgment this case will be reversed and remanded for a new trial in conformity with this opinion.

Reversed

HENDERSON, PLAINTIFF IN ERROR, v. GLYNN, DEFENDANT
IN ERROR.

2	303
6	47
2	303
19	403

1. PRACTICE—TITLE TO OFFICE—MANDAMUS.

When a person is in actual possession of an office, under election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus.

2. SALARY PAYABLE TO DE FACTO OFFICER.

Payment to a *de facto* officer while he is holding the office and dis-

charging its duties, is a defense to an action brought by the *de jure* officer to recover the same salary.

3. SALARY—DE FACTO OFFICER ENTITLED TO.

One who holds a judicial office under a certificate of election issued by the secretary of state can maintain mandamus against the state auditor to compel the payment of the salary incident to the office, notwithstanding the fact that his election is contested in a pending action.

Error to the District Court of Arapahoe County.

THESE proceedings were instituted in the court below by James Glynn against John M. Henderson, state auditor, to compel the payment of the plaintiff's salary as district judge, an office to which he claimed to have been elected, and the duties of which he was discharging. He obtained judgment, and the defendant sued out a writ of error. The facts are fully stated in the opinion of the court.

Mr. H. B. JOHNSON, for plaintiff in error.

Mr. H. RIDDELL, for defendant in error.

REED, J., delivered the opinion of the court.

Proceeding by mandamus to compel payment of salary of defendant in error, as district judge of the thirteenth judicial district. At the general election of 1891 defendant in error and one Charles L. Allen were candidates for the office. Upon the 2d day of December following, the state board of canvassers met at the capitol, and the votes of the judicial district were canvassed, defendant declared to have been elected, and the certificate of his election duly issued by the secretary of state. The defendant qualified and entered upon the discharge of the duties of such office, and has since been, and still is, in possession of the office, and in discharge of his duties. Charles L. Allen, the opposing candidate, claiming that the defendant was not legally elected to the place, and that he was, instituted proceedings to contest

the title to the office. Such proceedings are now pending and undetermined in the supreme court. Such contest having been instituted and undetermined, plaintiff in error refused to draw warrants for the payment of the salary of the defendant. Application was made to the district court for a writ of mandamus to compel the payment. As a defense to the application, the respondent set up the existing contest, and alleged want of title to the office and the irregularity of the incumbency. The writ was allowed in the district court, and the matter brought into this court by writ of error for review. Defendant in error having been, by the board of canvassers, declared elected to the office, and having qualified, entered upon, and continued to perform the duties of the office, and no judgment of ouster having been entered against him, he was not only in under color, but, holding all the legal evidence of rightful occupancy, has been and is *de facto* judge of the judicial district, and will so remain unless ousted by judgment in proper proceedings. The defense interposed is unavailing in this action. Title to the office, as between the contestants, cannot be determined in a collateral proceeding, nor in this form of action. The district court could not, nor can this court, legally take notice of the existence of the contest for the office. When a person is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus. This is the established doctrine, both in England and the United States, and might be supported by almost innumerable decisions. See Dill. Mun. Corp. §§ 674, 678, 679; High, Extr. Rem. § 49; *People v. New York*, 3 Johns. Cas. 79; *People v. Stevens*, 5 Hill, 629; *In re Gardner*, 68 N. Y. 467; *Duane v. McDonald*, 41 Conn. 517; *People v. Detroit*, 18 Mich. 338; *People v. Head*, 25 Ill. 325. In England, *King v. Mayor, etc., of Winchester*, 7 Adol. & E. 215; *Queen v. Councilors of Derby*, 7 Adol. & E. 419; *King v. Mayor, etc., of Oxford*, 6 Adol. & E. 349; *King v. Mayor of Colchester*, 2 Term R. 259. The only motive of the state auditor in re-

sisting payment was to protect himself, and protect the state, against double payment of the same salary. Under existing facts and the authorities, both he and the state would be amply protected in paying the salary to the incumbent. That he is judge *de facto*, in possession of the office and in the discharge of his duties, under color of an election, and holding all the evidence of being there rightfully, is admitted or unquestioned. In *Terhune v. Mayor*, 88 N. Y. 251, it is said: "It is no longer open to question in this state that payment to a *de facto* officer, while he is holding the office and discharging its duties, is a defense to an action brought by the *de jure* officer to recover the same salary." See *People v. White*, 24 Wend. 540; *People v. Cook*, 8 N. Y. 67; *Lambert v. People*, 76 N. Y. 220; *Dolan v. Mayor*, 68 N. Y. 278; *McVeany v. Mayor, etc.*, 80 N. Y. 185; *McManus v. City of Brooklyn*, (City Ct. Brook.) 5 N. Y. Supp. 424; *Auditors v. Benoit*, 20 Mich. 176; *State v. Clark*, 52 Mo. 508; *Westberg v. City of Kansas*, 64 Mo. 493; *Steubenville v. Culp*, 38 Ohio St. 23; *Shannon v. Portsmouth*, 54 N. H. 183; *Commissioners v. Anderson*, 20 Kan. 298. This seems to be the general doctrine in most of the states,—in two or three, notable in the state of Maine, the reverse has been held,—but they can only be regarded as exceptions to a general rule, which appears to be well founded in reason and justice. It follows that the judgment of the district court should be affirmed.

Affirmed.

2	306
18	527
2	306
18	28
18	29
2	306
19	248

LUSK, PLAINTIFF IN ERROR, v. PATTERSON ET AL, DEFENDANTS IN ERROR.

1. PROBATE MATTERS—CLAIMS AGAINST ESTATES.

Debts against an estate are only those contracted by the deceased.

2. SAME.

A debt contracted by the administratrix is not a debt against the estate.

3. INFANTS—INCAPACITY OF.

Infants are incapable of consenting to anything prejudicial to their inheritance, and any consent given can be retracted after becoming of age. Their guardians have no power to bind them in such matters.

Error to the District Court of Arapahoe County.

PLAINTIFF in error was plaintiff below. He was for some years (and perhaps still is) a lawyer engaged in practice in Washington, D. C. The suit was brought to recover \$6,000 and over for professional services.

Prior to the year 1864 John S. Fillmore was an assistant paymaster of the government. In that year he died intestate, leaving an estate principally in land in the city of Denver, and leaving as heirs, his widow, Elizabeth M., and two sons. At the time of his death he was indebted in a large amount to the government for moneys that had come into his hands in his official capacity. Elizabeth M. (the widow) married Jeremiah Kershow. Two sons were the issue of such marriage. In 1868, Mrs. Kershow was appointed administratrix of the estate of her former husband, Fillmore, and acted as such until her death in 1876. Mrs. Kershow, by will, left her entire estate to her husband, Jeremiah. He died testate in 1882. After his death the two sons of Fillmore and the two sons of Kershow became the owners of the estate left by Fillmore. Some time after the death of Fillmore, the date does not appear, but subsequent to her marriage with Kershow, Elizabeth M. employed the plaintiff to effect, if possible, a settlement with the government.

By the terms of their agreement plaintiff was to receive as compensation twenty per cent of the amount that he succeeded in reducing the government claim against Fillmore. It appears he succeeded in reducing it \$30,069.31, and claimed \$6,013.96 for such services. On the 4th of September, 1874, Elizabeth M., as administratrix, executed and filed in the probate court a writing acknowledging the correctness of the claim and consenting that the claim be allowed against

the estate; and on the same date W. C. Kingsley, probate judge, allowed the claim "to be paid in due course of administration of said estate and be classed in the fourth class of claims against said estate." The claim remained unpaid and in this condition, at the time of the death of Mrs. Kershow (administratrix). After her death, C. B. Patterson, defendant in error, was appointed administrator of the estate of Fillmore and Mrs. Kershow and guardian of the two Fillmore boys, and Thomas M. Clayton and J. Henry Kershow were executors of the estate of Jeremiah Kershow after his death in 1882, and J. Henry Kershow was the guardian of the Kershow boys. A difficulty having arisen between the two sets of boys, an agreement was made between Patterson, the administrator, and the executors of Kershow, by which each set of heirs was to pay one half of the indebtedness of the estate. In 1885, Patterson made his final settlement as administrator. All other indebtedness had been paid. It is alleged that Patterson, at the time of the settlement and his discharge, represented to the probate court that plaintiff's claim had never been prosecuted to judgment; had not been continued from term to term as required by law, and by such representation procured its dismissal for want of prosecution.

This suit was brought in the district court against Patterson and the sons of Fillmore, who had attained their majority, to collect the one half of the original claim of \$6,000 and over, which one half with interest amounted to over \$5,000 at the time of bringing the suit.

It will be observed that the allowance of the claim against the estate at the instance and request of the administrator occurred July 25, 1874; the settlement of the estate and discharge of Patterson in 1885. This suit was commenced in July, 1887. Various defenses were interposed, several of which it will not be necessary to notice. That considered important and conclusive of the case is the eighth—in effect, that the allowance of the claim against the estate was erroneous; that it was the individual debt of Elizabeth M. Ker-

show for professional services rendered her long after the death of Fillmore, and not the debt of Fillmore at or before his death, nor of his estate.

A trial was had to the court; the issues found for the defendants, and on February 20, 1888, a judgment and decree entered against the plaintiff dismissing the complaint, and for costs.

Messrs. THOMAS & THOMAS, for plaintiff in error.

Messrs. MARKHAM & CARR, for defendants in error.

REED, J., delivered the opinion of the court.

No opinion was filed by the trial court. The finding was general, consequently there is nothing to show upon what issues the judgment was based. From the time of the allowance of the claim by the probate court to the bringing of this suit was about thirteen years, during which no steps whatever were taken to secure the payment of the claim. From 1868 to the time of her death in 1876, Mrs. Kershow, at whose instance the claim was allowed, was administratrix. From 1877 to his discharge in 1885 the defendant, Patterson, was administrator, and during all these years the claim remained in abeyance unprosecuted. The estate was, during the entire time, solvent. Why it was not prosecuted is not satisfactorily shown. The claim at least was very stale—not one to appeal strongly to a court. All legal presumption of vitality and validity being against it. It will also be observed that the claim was dismissed and stricken from the docket on the 6th of April, 1885, and no effort made to revive or reinstate it in that court. It is impossible to determine from the pleadings whether plaintiff relied upon the supposed judgment or allowance of the claim in the probate court, or upon the contract of June 8, 1882, wherein it was agreed that the two sets of heirs should, respectively, pay each one half of all debts owing by the estate, or upon both. The suit only having been brought against one set of heirs for one half of the claim, it would seem to have been predicated

upon the contract. The other one half has recently been determined in the supreme court of this state in the case of *Lusk v. Kershow et al.*, where it was held such an action could not be maintained, affirming the judgment of the district court. In that case the court did not find it necessary, on the errors assigned, to determine whether or not the claim was a valid one against the estate. The contract between the guardians as to the payment of debts was held invalid, and the case determined principally upon that ground.

In this case three supposed errors are assigned:

The first, the admission of improper and rejection of proper evidence.

The second and third may be consolidated, and are in substance only to the effect that the judgment was wrong; that it should have been for plaintiff.

We shall not examine the case with reference to the first assignment. In our view it was immaterial what, or whether any evidence, was received or refused. The first question to be determined is, was the claim in question a debt of the estate of John S. Fillmore?

The debts against an estate are and, of necessity, can only be, those contracted by the party before death, before the property becomes an estate to be administered. This debt was contracted by the administratrix nine years after the death of Mr. Fillmore. The services for which the debt was contracted were, beyond question, beneficial to the administratrix and her children as heirs, undoubtedly increased the amount of the estate to be distributed, but this fact did not make the claim for such services a legal demand against the estate. The claim was for services in compromising and reducing a large claim against the estate, by which some \$30,000 was added for distribution. It appears to have been a successful effort in getting a large amount of a valid claim remitted or condoned. It must be observed that there is a wide distinction between debts due by an estate and those contracted in the course of administration, and in the manner of their allowance. To allow any debt contracted in administering

an estate as the debt of the estate, would be error, and it certainly was in this case where the allowance was made solely upon the authorization of the administratrix, who had contracted it. It opens the door to fraud. A pretended creditor and the administrator, by collusion, could absorb the entire estate. The claim was not the debt of the estate; first, for the reason that it had no existence at the time of Fillmore's death, nor until nine years afterwards. This statement of a legal conclusion so obvious, needs no support from authority.

Our statute is conclusive of the question. Sec. 3606, chap. 114, Genl. Stats. is as follows: "Fourth. All other debts and demands of whatsoever kind, without regard to quality or dignity, *which shall be exhibited within one year from the granting of letters, as aforesaid, shall compose the fourth class * * ** and all demands not exhibited within one year, as aforesaid, shall be forever barred," etc. See also §§ 3607, 3608, 3609, 3610, 3617, 3520, same chapter. That it was not a debt against the estate, see Schouler on Exec. & Adm. § 544; *Fallon v. Butler*, 21 Cal. 25; *Gray v. Palmer*, 9 Cal. 689; *Carr v. Caldwell*, 10 Cal. 380; *Gurnee v. Maloney*, 38 Cal. 87; *Bates, Adm., v. Varney*, 40 Ala. 441.

To have been a claim against the estate, it must have been a debt contracted by the intestate during his lifetime, or resulting directly from contracts made or liabilities assumed during life. The words "claims against an estate," as used in the statute, apply only to such claims as were debts against the deceased. It follows that the allowance by the probate judge was erroneous, and the supposed judgment void, and the subsequent action of the court in reversing and holding it void, correct, no matter upon what grounds it was put by the court or parties.

The right to sever and sue each set of heirs for a half could only be predicated upon the agreement entered into by the guardians in 1882. That was void. The guardians of the minor heirs had no power to bind them by a contract of that kind. The authorities in support of this proposition are numerous. See *Hutchinson v. Laughlin*, 15 Colo. 492; *Daniel Chy. Pl. & Pr.* (4th ed.) 169-173; *Enos v. Capps*, 12 Ill.

255; *Bennett v. Bradford*, 132 Ill. 269; *Lusk v. Kershow*, 17 Colo. 481.

Had the guardians of the minor heirs had the power to bind their wards by a contract of the kind under consideration, the claim in this case, as shown above, would not have been embraced in it.

The contract was that each set of heirs should pay one half of all "claims against the estate." This not being a claim against the estate, was not brought within its provisions.

The supposed consent and signatures of the heirs to the contract in question could add nothing to its validity; being infants, they were incapable of consenting to anything affecting their inheritance, and any consent given could be retracted after becoming of age.

The action is one at law, and, to be sustained, the validity of the claim as one against the estate and the validity of the contract must have been established, or a recognition of it and an express promise by the heirs to pay after attaining their majority, proved.

The right to follow an estate or the proceeds of it in the hands of heirs after distribution and settlement is one that can only be enforced in equity, where the character of the claim and the circumstances are such as to render the retention by the heirs inequitable. Then all unreasonable delay and failure to prosecute and secure payment during administration must be legally and satisfactorily explained, and the suit must be against all to whom the estate was distributed.

It is ably contended that the claim was barred by the statute of limitations, and many authorities are cited that seem to establish the contention, but having found that the claim was not a valid one against the estate, that in fact it was barred long before it was contracted, and that the contract relied upon created no legal liability to pay it, it becomes unnecessary to determine the questions of statutory bar and laches.

It follows that the judgment of the district court must be affirmed.

Affirmed.

THE DENVER, TEXAS & GULF RAILROAD COMPANY, APPELLANT, v. ROBBINS ET UX., APPELLEES.

2	313
26	23
2	313
30	457

1. PLEADING—NEGLIGENCE.

Negligence is sufficiently charged in a complaint which states that the defendant railroad company was unlawfully and negligently occupying a street crossing with its engines in violation of a city ordinance, and that by reason of that fact, and without negligence on part of the plaintiff, the injury complained of resulted.

2. NEGLIGENCE PER SE.

The obstruction of a street crossing by railroad engines, in violation of an ordinance, constitutes negligence *per se* on part of the railroad company.

3. PROXIMATE CAUSE—A TEST.

In determining what is the proximate cause of an injury one of the most valuable of the *criteria* is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as a cause of the misfortune, the other must be considered as too remote.

4. PROXIMATE CAUSE—A QUESTION OF FACT.

Ordinarily the question of what was the proximate cause of an injury is one for the jury and not for the court.

Appeal from the District Court of El Paso County.

THE facts are fully stated in the opinion of the court.

MESSRS. TELLER & ORAHOOD, for appellant.

MR. T. A. McMorris, for appellees.

RICHMOND, P. J., delivered the opinion of the court.

The appellees brought this action to recover for the loss of their child. It is alleged in the complaint that on March 9, 1888, while the Denver, Texas & Gulf Railroad Company were operating a railroad through the city of Colorado Springs, its employees unlawfully and negligently caused to

stop and stand two of its engines and trains on Cucharas street crossing in said city in such a manner that the engines stood upon the crossing facing each other and occupied all of the street except about twenty-five feet in the middle, said street being one hundred feet wide; that all persons passing along said street were obliged to pass to the middle of the street and through this space between the engines; that Anne Robbins, one of the plaintiffs and wife of Daniel W. Robbins, with their daughter aged three years was, while the engines were so remaining, passing on foot between the locomotives on her way to their home; that an omnibus team came immediately behind her, and the horses, becoming frightened at the engines and the noise and confusion of the steam then escaping from them, violently and with uncontrollable force jumped, swayed aside and ran over plaintiffs' child, which resulted in her death. It is also alleged that the death was the result of negligence on the part of defendant in permitting the engines to stand upon the street crossing in violation of an ordinance of the City of Colorado Springs, and was without fault or negligence on the part of the plaintiffs or either of them.

The answer admits the injury and death of the child, and denies all the other allegations of the complaint.

The cause was tried to a jury and, after all the testimony of plaintiffs and defendants had been introduced, a motion was interposed for an instruction to find for the defendant, which was refused, but the court generally instructed. The jury returned a verdict for the plaintiffs in the sum of \$3,000. Motion for a new trial was denied and judgment rendered on the verdict. To reverse this judgment appellant prosecutes this appeal.

The testimony shows that the depot of the defendant company was located near the crossing where the alleged accident occurred; that a freight engine was detained at the depot awaiting the arrival of a delayed passenger train, which on its arrival was halted at the edge of the plank crossing in the middle of the street; that the omnibus was at the

depot for the purpose of receiving the passengers, and having obtained its load the driver started to cross the street between the two engines and immediately behind the plaintiff, Anne Robbins, with the little child; that one of the horses suddenly plunged or jumped in such a manner as to cause the tongue or pole of the bus to strike Anne Robbins, knocking her down, and the wheel of the bus passed over the child, resulting in its death.

It is also in testimony that the street is about one hundred feet wide and that the crossing of plank was twenty-five feet in width and a part of the road used to drive over; that the cowcatcher of the passenger train was over the crossing.

There is some conflict of testimony with reference to the amount of steam that was escaping from one or both of the engines, but substantially it is agreed or undisputed that the two engines were on the street and close to the plank crossing, possibly with their noses projecting over the plank; that the space between the two engines was between twenty-five and thirty feet; that this space was the point where teams usually crossed, and was planked for that purpose; that the horses when on the crossing or just about leaving the crossing became frightened at the engines and escaping steam.

It is claimed by appellant that the complaint does not state facts sufficient to constitute a cause of action, because it appears by the complaint that the alleged negligence of the defendant company was not the proximate cause of the injury complained of. It is further contended that the evidence did not establish the fact to be that the alleged negligent act of defendant was the proximate cause of the injury complained of; that it was not enough to show that an accident had occurred and damages had been sustained.

It is contended by appellees that the unlawful occupation of the street in violation of the ordinance was negligence, and that the fact that they were so unlawfully occupying the street caused the horses to become frightened, which re-

sulted in the death of the child. Consequently that the neglect of the defendant company was the proximate cause of the injury for which damages are sought. And that the question of whether the neglect was a proximate cause was a question for the jury, and not for the court.

The complaint alleges that the railroad company was unlawfully and negligently occupying a street crossing in violation of the city ordinance, and that by reason of the fact that the defendant company so negligently caused and permitted its engines to stand upon the street crossing and without any negligence on the part of the plaintiffs or either of them the injury resulted. We do not deem it necessary to state more of the complaint than this bare outline. It is sufficient to charge the company with negligence and that by reason of the company's negligence the injury resulted. *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 166.

In the foregoing case a complaint of a similar nature was passed upon and it was held sufficient. In the course of the discussion, Elliott, J., says: "In a carefully prepared and very able brief, appellee's counsel urges that no cause of action is shown, because the result was one which the appellee's servants could not have anticipated, and because the injury was not the proximate result of the negligence of the servants of the appellee."

The argument there advanced is precisely the argument here. And the reasoning of the court there is directly applicable to this case.

And the court further says: "It is true, as urged by counsel, that the injury alleged as the cause of action did not directly and immediately result from appellee's negligence, for there was an intervening agency. The premise is well assumed, and the question is: Does the conclusion drawn logically follow? If the maxim quoted is to be given the wide sweep which appellee claims, then, wherever there is an agency intervening between the original cause and the injury, there can be no recovery. This is not the law. An inter-

vening agency does not always shield the wrongdoer from responsibility, where the injury flows from his wrongful act."

In that case as in this a railroad company and horses were a prominent feature. And we consider that case sufficient authority, without further citations, to warrant us in asserting that the complaint in this case states facts sufficient to constitute a cause of action. This brings us then to the discussion of the main question: Was the negligence of the company the proximate cause of the injury?

It is admitted in the argument that the occupation of the street crossing by the company in the manner alleged and proven was unlawful, and that this of itself was negligence there can be no doubt.

In the case of *Young v. G. H. & M. Ry. Co.*, 56 Mich. 430, it was held that, "a railroad company has no right to obstruct a highway with its cars for a longer period than five minutes at any one time, a violation of its duty in this respect is negligence and if a party is injured by reason thereof, being free from fault on his own part, the company will be liable therefor."

In the case of *Correll v. The B. C. R. & M. R. R. Co.*, 38 Iowa, 120, it was held that, "the running of a railroad train within city limits at a prohibited rate of speed constitutes negligence *per se*."

In the foregoing Michigan case the statute permitted railroad companies to occupy street crossings for a period of five minutes and no longer. And the allegations of the complaint were that the railroad company occupied the street crossing for a period of ten minutes. In the case at bar no such privilege was accorded to the railroad company, and the occupation of the street crossing for any length of time constituted an unlawful occupation and no testimony is introduced to show that such an occupation was even reasonable or necessary.

In addition to the authorities cited we think our own supreme court in the case of *Blythe et al. v. The Denver & Rio Grande Ry. Co.*, 15 Colo. 333, has practically settled the ques-

tion under consideration. Many of the authorities referred to in this case are there reviewed, and it was held that the question of what was the proximate cause of the loss and of negligence were questions of fact to be determined by the jury from the evidence under proper instructions from the court.

Where the statute imposes a duty, the failure to discharge this duty constitutes negligence. *Dodge v. The Burlington, C. R. & M. R. R. Co.*, 34 Iowa, 276.

Yet it is claimed that notwithstanding the railroad company unlawfully occupied the street crossing, that nevertheless this negligence and this unlawful occupation was not the proximate cause of the injury. It is admitted that the negligence of the railroad company must be the proximate cause of the injury in order to entitle the plaintiffs to recover. As to what is proximate cause different tests have been suggested. But when one has examined them all it remains for the courts to decide each case largely upon the special facts belonging to it, and often upon the very nicest discrimination. As was said by Justice Miller in the case of the *Insurance Company v. Tweed*, 7 Wallace, 44: "One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as a cause of the misfortune, the other must be considered as too remote."

The record in this case discloses the fact to be that the railroad company was unlawfully occupying the street crossing; that the driver, after receiving his load of passengers, had an undoubted right to proceed to convey them to their destination in the city, and in order to do so was warranted in crossing the street between the engines; that the plaintiff Mrs. Robbins, with her child, was equally entitled to cross at the same point. In fact the case discloses no neglect on the part of the plaintiffs, nor on the part of the omnibus driver. And we believe that we are justified in holding that but for the proximity of the defendant's engines to the plank crossing of

the street and its unlawful occupation of the same that the horses would not have become so frightened and unmanageable as to have caused the injury complained of.

“One who does an act likely to cause horses to take fright must be deemed to be responsible for injuries caused by horses running away under the influence of fright. This responsibility is not to be confined to the horses which suffer directly and immediately from fright, but must be held to extend to such injuries as may be reasonably expected to be caused by them running away. It is not unusual or unnatural, for horses, panic-stricken by fear, to run against and injure persons and property, and what is neither unnatural nor unusual the wrongdoer must be held to have anticipated.”

Billman v. Indianapolis, etc. R. R. Co., supra.

The case of *Insurance Company v. Tweed, supra*, was a case where cotton in a warehouse was insured against fire. The policy containing an exception against fire which might happen by means of an * * * *explosion*, earthquake or hurricane. An explosion took place in another warehouse, situated directly across a street, which threw down the walls of the first warehouse, scattered combustible materials in the street, and resulted in an extensive conflagration, embracing several squares of buildings, and among them the warehouse where the cotton was stored, which, with it, was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but came more immediately from a third building, which was itself fired by the explosion. In this case it was held that the explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause. In this case the court held that the insurers were not liable

because of the fact that the fire originated from the explosion against which they had expressly exempted themselves.

In the case of *Milwaukee, etc. Ry. Co. v. Kellogg*, 94 U. S. 470, the question of what is or what is not the proximate cause of an injury was involved. Several cases were cited from New York and Pennsylvania, and Justice Strong in commenting upon them said: "Those cases have been the subject of much criticism since they were decided and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine—that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer—they have not been accepted as authority for such a doctrine, even in the states where the decisions were made. And certainly they are in conflict with numerous other decided cases. * * * The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement."

In *Ricker v. Freeman*, 50 N. H. 420, the court held that: "Where an injury is the result of two concurring causes, one party in fault is not exempt from full liability for the injury, although another party may be equally culpable."

"This was a case where B seized A by the arm and swung him violently around two or three times, then letting him go, and A having thus been made dizzy, involuntarily passed rapidly in the direction of and came violently against C, who instantly pushed him away, and A then came in contact with a hook, and sustained an injury; it was held that A might maintain trespass *vi et armis* against B."

The case of *Billman v. C. & L. R. R. Co.* 76 Ind. 166, was one where it was alleged that a railroad company through its servants and agents managed and operated its locomotive and cars in such a recklessly and culpably negligent manner as to willfully and wrongfully cause a team of horses to take fright and run away, and that, because of such fright, and while unmanageable and running away, they ran against the plaintiff's horse and caused its death. It was held that the maxim, *causa proximi, et non remota, spectatur*, was not applicable, but that the injury sued for was the usual and proximate result of the wrongful act of the company, showing not passive negligence, but wanton and willful wrong in this, that the railroad company negligently and wantonly sounded a steam whistle causing the horses to take fright and run off.

In the case of *Lake v. Milliken et al.*, 62 Maine, 420, it was held that, "every wrongdoer is at least responsible for all the mischievous consequences that might be reasonably expected under the circumstances to result from his misconduct. Where the injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable."

In the case of *Lehigh Valley R. R. Co. v. McKeen*, 90 Pa. St. 122, it was held that the question of proximity was one of fact peculiarly for the jury. And in passing upon this question the court took occasion to say: "How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts, which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence.

The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together, that they become a natural whole, or whether the chain of events is so broken, that they become independent, and the

final result cannot be said to be the natural and probable consequence of the primary cause—the negligence of the defendant. * * * In all or nearly all cases, the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and from the nature of the thing must be referred to the jury.” *Railroad Co. v. Hope*, 30 P. F. Smith, 373.

In the case of *Crawfordsville v. Smith*, 79 Ind. 308, it was held that, “Where the negligence of the defendant is the cause of an injury, an action will lie, although there may have been some intervening agency.”

The case of *Joseph Lowery, an Infant, v. Manhattan Ry. Co.*, 99 N. Y. 158, was a case where “fire fell from a locomotive on defendant’s road upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse became frightened and ran away, the driver attempted to drive him against the curbstone to arrest his progress, the wagon passed over the curbstone, threw the driver out, and plaintiff who was on the sidewalk, was run over and injured.” In this case it was held that so long as the injury was chargeable to the original wrongful act of the defendant, it was liable; that the action of the driver in view of the exigency of the occasion, whether prudent or otherwise, might be considered as a continuation of the original act, and so that act was the proximate, not the remote cause of the injury.” It was held also, “that the injury was a natural and probable consequence of the defendant’s negligence.”

The foregoing is a well considered case, and in support of the conclusion a large number of authorities are cited.

The case of *Forney v. Goldmacher*, 75 Mo. 113, was one where, “Defendant finding a team of horses hitched to a post in the street in front of his premises, willfully and intentionally threw a stream of water from a hose upon them, whereby they were frightened and breaking away ran down the street

and collided with plaintiff's team. Held, that plaintiff was entitled to recover of defendant the damages caused by the collision." *Flagg v. The Inhabitants of Hudson*, 142 Mass. 280.

After a careful examination of all the authorities within our reach in which this perplexing question of proximate and remote cause is discussed, we have concluded that the rule as announced by the supreme court of the United States and by a majority of the state supreme courts is that ordinarily the question of what was the proximate cause of the injury is a question of fact to be determined by the jury. And, that the jury having passed upon this question in the case at bar, we would be unwarranted in disturbing the judgment.

The judgment is affirmed.

Affirmed.

LOWENBRUCK, APPELLANT, v. THE DENVER & RIO
GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL—JURISDICTION.

The supreme court being without jurisdiction to entertain the appeal, a transfer of the cause to court of appeals will not confer jurisdiction upon the latter.

Appeal from the District Court of Huerfano County.

Mr. HOMER A. COLE, for appellant.

Messrs. WOLCOTT & VAILE, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

In this action the plaintiff, Lowenbruck, sought to recover from the defendant, the Denver & Rio Grande Railroad Company, the value of certain improvements destroyed by fire,

which fire it is alleged was communicated by sparks from the engines of the defendant company.

By the record in this case it appears that judgment was rendered for the defendant below, appellee herein, for costs only. From this judgment an appeal was prosecuted and a transcript filed March 21, 1890, in the supreme court of this state. The cause was transferred from the supreme court to the court of appeals.

Under the act of 1887, appeals to the supreme court were allowable only when the judgment amounted, exclusive of costs, to the sum of \$100, or related to a franchise or freehold.

The supreme court was therefore without jurisdiction to entertain the appeal. *The Board of County Commissioners of Pitkin County v. Aspen Mining & Smelting Co.*, 1 Colo. Ct. Ap. 125.

A transfer of the cause from the supreme court to this court cannot confer jurisdiction upon us that the supreme court did not have. And, much as we might desire to pass upon the merits of this cause on this appeal, we have no authority so to do, as will be seen by reference to the authorities cited in the case of *The Board of County Commissioners of Pitkin County v. Aspen Mining & Smelting Co.*, *supra*.

The appeal is accordingly dismissed.

Dismissed.

HILL, PLAINTIFF IN ERROR, v. THE COLORADO NATIONAL
BANK, DEFENDANT IN ERROR.

1. SALE—WAREHOUSE RECEIPTS.

Goods or property in store may be transferred by assignment and delivery of the warehouse receipt.

2. SAME.

The assignment and delivery of a warehouse receipt for goods in store is a constructive delivery of the goods which takes the place of the actual delivery required at common law.

2	324
5	306

2	324
33s	210

2	324
35S	468

3. PRACTICE—DISCRETION.

The conduct of trial and the control of counsel is so fully within the discretion of the trial court, that its action in this respect will not be reviewed, unless it is manifest that discretion has been plainly and grossly abused.

Error to the Superior Court of the City of Denver.

Plaintiff in error being U. S. marshal, seized the whole-sale stock of liquors, wines, cigars, etc., of B. P. Brasher & Co., a firm that had been for some years doing business as wholesale merchants in Denver, upon writs of execution and attachments. Brasher & Co. had been doing its banking business with the defendant in error, and was indebted in a large amount to the bank, and was also heavily indebted to others. The assets consisted of book accounts, bills receivable, a stock of goods in the store where the business was transacted, and a quantity of goods in warehouse, for which the warehouse receipts were held, of the warehouse firm of Ed. Treganza & Co. Prior to and in the early days of December, 1886, the warehouse receipts of Treganza & Co. were assigned and delivered to defendant in error to secure the money due it. The goods having been levied upon and possession taken by plaintiff in error, this suit, being an action for the conversion of the property, was, on February 2d, 1887, brought by the bank to obtain possession of the goods.

The complaint was in the usual form, alleging ownership, right of possession, the value being \$9,000, the detention, conversion, etc., and asking judgment for \$9,500.

The answer contained specific denials of the allegations of the complaint, justification as U. S. marshal under a writ of execution, and a writ of attachment against Brasher & Co., and for further answer that "the plaintiff's pretended title to the said goods and chattels was acquired in the following manner:

"The said Benjamin P. Brasher was the owner of said goods; he was indebted to the said Alfred Greenebaum & Co. and P. Pohalski, and to others, in an amount exceeding

\$125,000; that being unable to pay these obligations and plaintiff being aware of that fact, plaintiff conspired with said Benjamin P. Brasher with the design and intent to delay, hinder and defraud said Brasher's creditors and carried out such conspiracy to defraud by agreeing and did create for the said Brasher, a false and fictitious credit, by which the said Brasher was to get and did get possession of certain large quantities of goods, some of which were concealed by the said B. P. Brasher, with the knowledge of plaintiff, in store warehouses, the storage receipts of which were turned over by said B. P. Brasher to plaintiff for a pretended illusory and fictitious consideration, the plaintiff agreeing that he would hold said property under a secret trust for the benefit and use of said B. P. Brasher."

Replication, admitting the official position and that the goods were seized by him in his official capacity under the writs, etc., and denying the allegations in the special answer. Trial was had to a jury and an immense mass of testimony introduced; a verdict was found for the plaintiff (defendant in error) and that the goods were of the value of \$10,875—a sum considerably exceeding the amount claimed in the complaint; a motion to set aside the verdict, and for a new trial, was made. The plaintiff then remitted the sum of \$1,660, leaving the verdict for \$9,215. The motion for a new trial was overruled and judgment upon the verdict.

Mr. J. N. BAXTER and Messrs. WOLCOTT & VAILE, for plaintiff in error.

Messrs. MARKHAM & CARR, for defendant in error.

REED, J., after stating the facts, delivered the opinion of the court.

The validity, regularity and legitimacy of a transfer of goods or property in store, by the assignment and delivery of the warehouse receipt, have been so long and so frequently

recognized that it is useless to question it or cite authorities in support of it. Such transactions to the extent of millions occur daily. To transfer, deliver and change the actual possession of commodities is not only impracticable but impossible; hence, the system of a constructive delivery of the chattels by the certificate of the third party having the possession, has become a necessity, and such constructive delivery takes the place of the actual delivery required at common law. Two things are necessary to accomplish the change of title: first, the assignment and delivery of the certificate—the evidence of the ownership—and that the property transferred is in existence in the custody of a third party and at a designated place; second, there must be a consideration.

An existing indebtedness is a good consideration, and a pledge by way of collateral security for money advanced is effectual to pass the title, as in other cases, and the transfer and delivery of the certificate is as effectual to pass the title as actual manual delivery: See Jones on Pledges, §§ 280, 281; *Second Nat'l Bank v. Walbridge*, 19 Ohio St. 419; *Gibson et al. v. Chillicothe etc. Bank*, 11 Ohio St. 311; *Horr v. Barker et al.* 8 Cal. 603; *Burton v. Curyea*, 40 Ill. 320. Like any other mercantile transaction it may be impeached for fraud and collusion.

Twenty-six supposed errors occurring upon the trial are assigned; of these, the first nineteen are to the reception and rejection of evidence. After a very careful examination, we conclude that plaintiff in error was not prejudiced by any of the rulings upon the evidence. Most of the objections were in regard to incidents or matters collateral to the principal issues, and the testimony immaterial whether rejected or admitted.

The only important issue to be tried was that formed upon the last paragraph of the answer. The question being whether the transactions between the bank and Brasher & Co. were collusive and fraudulent for the purpose of defeating creditors, or *bona fide* transactions in the regular course of business. Great latitude was allowed upon the trial and

a volume of testimony admitted in regard to collateral matters, such as the amounts of the indebtedness of the firm to other creditors, the manner in which it was contracted, the manner in which business of the firm was transacted, the disposition of the books of the firm, and bills receivable, the disposition of goods and their proceeds, other than those transferred to the bank, and the legitimacy of the claims of relatives as creditors, etc., none of which were pertinent to the inquiry or issue being tried, as neither the bank nor any officer of it was in any way attempted to be shown to have been connected with them or to have had any knowledge of them. Such latitude having been given in the way of evidence to impeach the transactions, and the jury having found as fact that the transactions were legitimate and regular, the only important issue was found for the bank, and under the numerous and repeated decisions in the courts of last resort in this state where an examination of the evidence, although conflicting, shows the finding to have been warranted, such finding will not be disturbed.

The defendant signally failed to establish the allegations in his special answer by any competent evidence.

The refusal of the court to give each of the instructions asked by the defendant from one to thirteen, both inclusive, is assigned as error. A careful examination fails to support the supposed error. Each was more or less objectionable; many calling for inferences from facts not in issue and not warranted by, or predicated upon, any proper evidence in the case. The portions of them applicable and proper to be given were embodied in the instructions given by the court. Exceptions were taken and urged to some portions or paragraphs of the charge as given. It is not claimed that the matter stated was erroneous of itself, but that the errors consisted in not adding to or modifying them by requiring some other substantive fact to be found.

The charge of a court is to be examined as a whole, an entirety. Isolated and detached paragraphs may be incomplete and objectionable when viewed alone and yet be eminently

proper taken in connection with the balance of the charge. We think the charge taken as a whole embraced all the law of the case necessary for the jury, and that it was fully as favorable to the defendant as was warranted.

It is assigned for error that the court arbitrarily fixed the time of counsel in addressing the jury to the prejudice of the defendant. It seems that each side was given one hour; the plaintiff fifteen minutes in opening, and the balance in closing, and the defendant given an intervening hour. Such matters are so entirely within the discretion of the trial court that error can seldom be predicated upon them, nor will they be reviewed in this court, unless actual prejudice is shown, or an unwarranted and arbitrary interference with the right of counsel and a palpable abuse of discretion.

The judgment must be affirmed.

Affirmed.

RAYMOND ET AL., PLAINTIFFS IN ERROR, v. THE PEOPLE,
ETC., DEFENDANTS IN ERROR.

1. CITY WARRANTS—STATUTE AS TO FORM OF, MANDATORY.

Section 22, art 3, of the charter of the city of Denver (Sess. Laws, 1885, p. 93), providing that every warrant drawn upon the city treasury shall show, among other things, the purpose for which it is issued, *held*, mandatory.

2. CITY WARRANTS—WHEN VOID.

The provisions of the statute as to the form and substance of a city warrant being mandatory, a warrant issued without a compliance with its requirements is void upon its face. (Reed, J., dissenting.)

3. FORGERY—VOID WARRANT.

Forgery cannot be predicated upon an instrument which, by reason of non compliance with statutory requirements, is void upon its face. (Reed, J. dissenting.)

4. SPECIAL COUNSEL FOR THE PEOPLE.

The trial court may in the exercise of sound discretion appoint one or more attorneys to assist the district attorney in the prosecution of criminal cases, and its action in this respect will not be reviewed except where a clear abuse of discretion is made apparent.

Error to the District Court of Arapahoe County.

THE defendants, George R. Raymond and James P. Hadley, were indicted for forging and uttering an alleged city warrant. There were twelve counts in the indictment and each count substantially sets forth, in terms and figures, the warrant which it is alleged was forged and uttered. The warrant is in the following words and figures:

“ Auditor’s Office, City of Denver. No. E. 1974.

“ Treasurer of the City of Denver. Pay to Joslin & Son or order \$3.50, three 50 — dollars, out of any money in the treasury not otherwise appropriated, for ———, and charge the same to miscellaneous fund; and this shall be your voucher. By order of the city council of date Jul. 31, 1890.

“ Issued Aug. 1, 1890.

“ [CITY SEAL.]

“ Attest:

“ W. H. MILBURN,

“ City Clerk.

“ _____,

“ Deputy.

Countersigned by

A. A. McKNIGHT,

City Auditor.

_____,

Deputy.

WOLFE LONDONER,

“ Mayor.”

The indictment charges that the defendants did feloniously and falsely alter the said warrant for the payment of money, by then and there feloniously and falsely writing in and upon the said warrant for the payment of money the figures “ 30 ” immediately preceding the figures “ 3.50,” and writing the words “ three hundred ” immediately preceding the word “ three,” so that the said warrant for the payment of money thereby became, and then and there was, of the tenor following:

“ Auditor’s Office, City of Denver. No. E. 1,974.

“ Treasurer of the City of Denver: Pay to Joslin & Son or order \$303.50, three hundred three 50 — dollars out of any money in the treasury not otherwise appropriated,

for ———, and charge the same to miscellaneous fund; and this shall be your voucher. By order of the city council of date Jul. 31, 1890.

“ Issued Aug. 1, 1890.

“ [CITY SEAL.]

“ Attest :

“ W. H. MILBURN,

“ City Clerk.

“ ———,

“ Deputy.

Countersigned by

A. A. McKNIGHT,

City Auditor.

—————,

Deputy.

WOLFE LONDONER,

“ Mayor.”

— with intent then and there to damage and defraud the city of Denver.

The third count of the indictment charges the felonious uttering and passing, as true and genuine, the warrant so feloniously forged and altered and counterfeited for the payment of money. Each and every other count in the indictment is substantially similar, and it is sufficient to say that they embrace the words and figures of the warrant above recited. The indictment was returned into court by the grand jury, signed by the district attorney, I. N. Stevens, and by James G. Belford and Caldwell Yeaman, special counsel, and was duly indorsed “ A true bill ” by John L. Dailey, foreman of the grand jury.

Before pleading to the indictment, defendants interposed a motion to quash, in which it is recited that all the proceedings before the grand jury, including the taking of testimony, were controlled by the special counsel, Belford and Yeaman, neither of whom were then and there the district attorney of such district, and neither of whom were then and there duly appointed and qualified district attorneys or deputy district attorneys, and neither of whom had any authority or lawful right to appear as attorney or representative of said people in taking the testimony before the said grand jury while said grand jury were deliberating upon said indictment, and neither of whom then and there duly appointed were qual-

ified in any way or manner to represent the people as required by statute, and neither of whom had been employed or appointed by the county commissioners of any county to appear and prosecute; that I. N. Stevens, Esq., the district attorney, was the duly elected and qualified district attorney for the second judicial district, and that he or his deputies did not appear before the grand jury which heard the testimony in said cause and presented said indictment; that he was neither sick nor absent nor interested in the case, nor incapacitated in any way or manner from discharging or performing the duties of said office, and had not declined or refused to prosecute said cause, and that the appointment of said Belford and Yeaman as special counsel by the court was without authority or warrant of law. The defendants also challenged the array of the grand jury, on the ground that the same had not been properly drawn, selected and impaneled. The motions and challenges were met in proper form by the people and overruled by the court. Thereafter special demurrers to the indictment were interposed, which were overruled. The cause was tried to a jury, and resulted in a general verdict of guilty. Motions for a new trial and in arrest of judgment were overruled, and the defendants sentenced to hard labor in the penitentiary for a period of five years. To reverse the judgment of the court below this writ of error is prosecuted.

Thirty-seven errors are assigned upon the record, but for the purposes of this opinion they can be embraced under five heads: First, the insufficiency of the indictment; second, the legality and authority of special counsel to appear before the grand jury, and in the prosecution of the case; third, the error of the court in admitting testimony on the part of the plaintiff over the objections of defendants; fourth, error of the court in admitting various exhibits offered by the people in evidence over the objections of defendants, and in permitting the jury to take the various exhibits when they retired to consider their verdict; fifth, error in the instructions. The cause was submitted upon briefs and oral argument.

Mr. F. C. GOUDY, Mr. A. M. STEVENSON, Mr. S. B. BERRY and Mr. C. D. MAY, for plaintiffs in error.

Mr. JOSEPH H. MAUPIN, attorney general, Mr. CALDWELL YEAMAN, Mr. JAMES B. BELFORD, Mr. THOMAS WARD, Jr., and Mr. H. B. BABB, of counsel.

RICHMOND, P. J., after stating the facts, delivered the opinion of the court.

The principal contention of defendants' counsel is that the indictment is insufficient in this: That the warrant alleged to have been forged and altered was void upon its face, and that forgery could not be predicted upon a void instrument; that special counsel, Belford and Yeaman, not being district attorneys or deputies, and not having been employed by the county commissioners of Arapahoe county, or any other county, but having been selected by the court as special counsel, were clearly without authority to appear before the grand jury, and in the prosecution of the defendants after presentment by indictment; that the court erred in admitting in evidence a large number of warrants of the city, some forged and others genuine. These are the three principal questions that were discussed before us in the oral argument.

The main and most important question, and the one with which we have had the greatest difficulty in reaching a conclusion, is the first. The testimony in the case shows that George R. Raymond was deputy city auditor; that James P. Hadley was deputy city treasurer; that J. Jay Joslin & Son had a claim against the city for merchandise furnished to the extent of \$3.50, which claim was duly presented to the city council and allowed, and thereafter a warrant was drawn for the sum of \$3.50, but in said warrant the purpose for which the appropriation was made or the warrant drawn was not included in the warrant; that thereafter the defendants, Hadley, Raymond, and one Milburn, the then city clerk, altered the warrant by inserting the figures "30" and

the words "three hundred" in the said warrant, and subsequently drew the entire sum of \$303.50 from the treasury of the city. It is insisted that the failure of the warrant to show on its face the purpose for which it was drawn renders it absolutely void, and consequently that no indictment for forgery can be predicated upon it.

I will divide this last proposition into two parts: First. Was the alleged warrant void upon its face? Second. If void, was it a subject of forgery?

Section 22, art. 3, of the city charter of Denver (Sess. Laws, 1885) provides as follows: "No money shall be paid out by the city treasurer for any purpose, except upon warrants drawn upon him by order of the city council and signed by the mayor, countersigned and registered by the auditor, and attested by the clerk; and every such warrant shall *show on its face* the date of its issue, the date of the order of the city council, to whom and for what purpose issued, and from what fund payable." It will be observed that the warrant upon which the charge of forgery is predicated omits to state for what purpose it was issued; and, in order to determine the validity or invalidity of this warrant, it is necessary to determine whether the provisions of the statute above recited are mandatory; and, before proceeding to the discussion of this question, it may be well to theorize as to the object of the legislature in providing for a specific recital in the warrant of the purpose for which it was issued. This provision of the statute is as important as any of the other enumerated requisites of a warrant. If we can omit the purpose for which it is issued, why can we not omit the signature of the mayor, the date of the order of the city council, to whom payable, and from what fund payable? The statute says it shall show on its face the purpose. The object of the legislature in providing for this insertion in the warrant, it occurs to me, was, among other things, that the treasurer might be advised of the fact that the claim for which the warrant was directed to be issued was one for which the moneys of the city could be legitimately appropriated. It must be con-

ceded that, should a warrant be drawn enumerating on its face an illegitimate purpose,—one for which the city had no right to expend money or to appropriate money,—the treasurer would be wholly unwarranted in disbursing the funds of the city in payment thereof. The reports are full of cases where it has been held that appropriations were *ultra vires*, and that a city should be enjoined from such expenditures. I could recite innumerable instances where a city, a county and a school district have deemed it prudent and wise to aid in enterprises of a private nature, which might be conceded would be of public benefit, yet appropriations for such purposes have been held *ultra vires*. If the warrant upon its face had shown such an illegitimate purpose, can it be contended that a treasurer would be warranted in the payment of it? If this be true, then the failure to specify the purpose is equally fatal. The lack of this information would justify the treasurer in refusing payment, and information that would bring to his mind that a warrant was for an illegitimate purpose would be equally a justification for the refusal of payment.

The basis of this discussion is fully supported by the cases which have passed on this and similar phases of the subject-matter of this inquiry.

In the case of *Merkel v. Berks Co.*, 81 Pa. St. 505, it was held that the directors and inspectors of the poor and prison of Berks county had no right to draw orders on the county treasurer for donations for benevolent purposes. On the trial of the case, Woodward, P. J., rendered an opinion, in the course of which he said: "Among other duties imposed on the county treasurer is that requiring him to disburse the moneys belonging to the prison, on orders drawn on him by the board of inspectors, necessary for the support of the poor. Moneys passing into his custody are such as shall be necessary for keeping, furnishing and maintaining the prison, and necessary for the support of the poor. To these purposes the public funds are destined. To provide for these purposes, the directors and inspectors are authorized to disburse the

funds by drawing orders which it is the duty of the treasurer to pay. Orders appropriating money to other purposes are illegal, and, if the treasurer has knowledge or means of knowledge of their illegality, it is his duty to refuse to pay them when they are presented. He is bound to know the extent and limit of the authority conferred upon him by the law under which he has accepted his office. In this case express notice was given him that the orders were drawn for none of the purposes specified in the acts of the assembly. Upon their face they were declared to be donations. The directors and inspectors had no more right to draw them, and the treasurer was no more justified in paying them, than if they had purported to be given to satisfy the gambling debt of a pauper, or to buy a prisoner a horse. * * * Municipal officers are held to strict accountability." On the removal of the record to the supreme court of Pennsylvania, it was held that "the orders paid by the treasurer of the county were illegal on their face, and therefore brought home notice to him of the want of authority in the directors of the poor to order the payment."

It seems to me that the supreme court of this state has practically settled this question in the case of *Traveler's Ins. Co. v. Denver*, 11 Colo. 435, wherein the identical section of the city charter was considered. There it is said that "these requirements as to what the warrant shall state are mandatory, and a warrant which does not comply with these requirements in its statements does not create any liability against the city, and is not evidence of a debt against it." But it is claimed this is *obiter dicta*. I cannot agree with the contention in this particular. I think it was essential to the decision of that case, but nevertheless it is a declaration, and indicates a conclusion of the supreme court of this state upon this question. It may be said, with considerable force, that courts are not bound to follow the mere declarations in opinions not necessary to the decision; yet I am inclined to the opinion that, if it was but an expression and wholly unnecessary, it still is a correct legal conclusion; or,

as Justice Miller says, "*obiter dicta* * * * are those observations thrown out by the court in delivering its opinions which, though in themselves valuable as statements of principles, and often sound principles, are not involved in the case before them, and therefore are to be treated merely as the suggestion of the judge, and not as the decision of the court. Very much of what is presented to the court as authority in the hearing of a case is of this character, and while it is not decisive, and does not carry the weight of a direct decision of the court in the case, it cannot be said to be wholly useless, when the observations proceed from a distinguished judge of high authority, and whose opinions are entitled to respect." Art. Amer. Law Review, April, 1889.

"The intention of the legislature should control absolutely the action of the judiciary. Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the wisdom or justice of the particular enactment. The means of ascertaining that intention are to be found in the statute itself, taken as a whole and with all its parts; in statutes on the same subject; antecedent jurisprudence and legislation; contemporaneous and more recent exposition; judicial construction and usage; and to the use of these means, and these alone, the judiciary is confined." Sedg. on Constr. Stat. and Const. Law, 325. "Mandatory statutes are imperative. They must be strictly pursued. Otherwise the proceeding which is taken ostensibly by virtue thereof will be void. Compliance therewith, substantially, is a condition precedent; that is, the validity of acts done under a mandatory statute depends on a compliance with its requirements. When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued. It is the condition on which alone a party can entitle himself to the benefit of the statute that its directions shall be strictly complied with. Otherwise the steps taken will be void. * * * What

the law requires for the protection of the taxpayer, for example, is mandatory, and cannot be regarded as directory merely. * * * The special powers given to corporations, to courts, or officers must be exercised with strict, substantial adherence to all directions of the statute. * * * A body corporate, created for a special purpose, with limited powers, being a creature of the statute, must conform in its action to the law of its creation, and acts done contrary to such regulations are simply void." Sutherland on Stat. Construction, §§ 454, 455, 456. "Where the thing to be done concerns and subserves rights both of the public and of individuals, in all these an intent is to be inferred that, in using a permissive phrase, the legislature really meant to enjoin an imperative duty." Endlich on Interpretation of Statutes, sec. 312. The last recited rule is much stronger than one necessary to cover the case presented here. The language of the charter is not permissive. It says the warrant shall show on its face the purpose for which it is issued. It is not, in any sense, a permissive phrase, and to embrace in the warrant its purpose certainly tends to subserve the public interest, and to protect the public funds in the custody and under the control of the city treasurer. When the object of the statutes are considered, and the general rules for the construction of such as concern the public and its affairs are followed, there is no escape from the conclusion that the statute is mandatory. This conclusion is abundantly sustained by an unbroken series of decisions, where the question has received attention.

Glidden v. Hopkins, 47 Ill. 525, was an action brought by Hopkins against Glidden and others, as directors of a school district, to recover upon a warrant. On the trial of the cause, plaintiff offered in evidence, to sustain the issue on his part, the original instrument, to the admission of which defendants objected, for the reason that the writing did not show on its face for what purpose it was drawn or what indebtedness it was to pay. The court overruled the objections, and plaintiff obtained judgment. In deciding the case, Judge

Breese used the following language : " Certain school funds collected from taxes levied by the order of directors, or from the sale of property belonging to any district, can be paid out on the order of the directors ; and all moneys and school funds liable to distribution, not being principal, paid into the township treasury, or coming into the hands of the township treasury, can be paid out only on the order of the proper board of directors, signed by a majority of the board, or their president and clerk ; and in all such orders the purpose for which, or on what account drawn, shall be stated, and a form is given in which they may be drawn. From the various provisions of this act, a studied design on the part of the legislature to protect the school fund, and guard it from all misapplication, is quite apparent. This provision, requiring orders to express on their face for what purpose drawn, must, in the light of this legislation, be regarded as mandatory, and the provision itself is so just, and so well calculated to protect the fund, that it cannot, and ought not, in any case to be dispensed with. The order offered in evidence was not an order authorized to be drawn, and consequently it furnishes no ground of action against the succeeding board of directors. * * * The board of school directors, though a corporation, are possessed of certain specially defined powers, and can exercise no others, except such as result by fair implication from the powers granted. * * * This order, tested by the statute, was void in its inception, and incapable of being made valid by the act of any succeeding board, or by the promise of any official to pay it." In the case of *District of Columbia v. Cornell*, 130 U. S. 655, it was held that certificates of indebtedness issued by a municipal corporation have no validity unless issued for a purpose authorized by law. In the case of *Bayerque v. City of San Francisco*, 1 McAll. 175, the section under consideration reads as follows : " Every warrant upon the treasury shall be signed by the comptroller, and countersigned by the mayor, and shall specify the appropriation under which it is issued, and the date of the ordinance making the same. It shall also state

from what fund and for what purpose the amount specified is to be paid ; also the appropriation under which it is issued and the date of the ordinance making the same." The judge, in delivering the opinion, said: "This cannot be regarded as a matter of form. It is a substantial requirement, and inserted to carry out the policy contemplated to be pursued for the protection of the public from the recklessness of city officers, and the collusion with them of third parties." The warrant referred to failed to specify the appropriation under which it was issued, and the date of the ordinance, and it was held that it could not be recovered on as a warrant, even in the hands of the original holder ; that they were not legally issued, nor was the treasurer authorized to pay them. "The defendant is not a private trading corporation, but a public municipal one. In the distribution of its powers among its agents, the legislature has interposed a check upon the officer having the custody of the public money, by authorizing him to pay only such warrants as purport on their face to have been issued under some previous appropriation, and the date thereof must be given. None other could lawfully issue."

In the case of *Smeltzer v. White*, 92 U. S. 390, it was held that where the statute required the treasurer to disburse some of the county money on warrants drawn and signed by the county judge, and sealed with the county seal, and not otherwise, the treasurer could pay no orders or warrants unless they were so sealed, and that no warrant is a genuine county warrant which is unsealed by the county seal. *Prescott v. Gonser*, 34 Iowa, 178 ; *Springer v. County of Clay*, 35 Iowa, 243 ; *State v. Smith*, 89 Mo. 409. *Reeve v. City of Oshkosh*, 33 Wis. 477, was a case where the charter of the city of Oshkosh provided that "all orders drawn upon the treasurer shall specify the purpose for which they were drawn, and shall be payable generally out of any funds in the treasury belonging to the city, except the school fund. Held, that this provision is mandatory, and no recovery can be had on an order which does not specify the purpose for which it is drawn." In the case of *Martin v. San Francisco*,

16 Cal. 285, it was held that where the warrants do not comply, in their form, with the requirements of the city charter, they would not constitute any authority to the treasurer to pay them, because they do not specify the appropriation under which they were issued or the date of the ordinance making the same. In the case of *City of Leavenworth v. Rankin*, 2 Kan. 357, this language is used: "Municipal corporations are creations of the law, and possess no powers except such as are conferred by law. They act under prescribed rules, and must act in accordance with them. They cannot, in any sense, be said to act as natural persons. When they undertake to make contracts, they must observe the regulations prescribed in that behalf, else there will be no contract, and no subsequent act can cure the defect. Their power to contract must be delegated by law, while that of a natural person is inherent. * * * When the law prescribes a prerequisite to their ability to contract, the obligation to observe it cannot with impunity be disregarded. Nor will a subsequently attempted ratification cure the defect. Such a construction would render nugatory the most salutary safeguards, and, in effect, make municipal corporations omnipotent. They must contract, if at all, within the prescribed limits, and according to the prescribed forms. They take no powers by implication." In the case of *Turner v. City of San Francisco*, 7 Cal. 463, it was held that "a comptroller's warrant, to be valid, must be in the form prescribed by the charter of the city."

Municipal warrants are instruments drawn by the officers of a corporation upon its treasurer, directing him to pay a certain sum of money specified therein to the person named or bearer. They are vouchers; the necessary instruments for carrying on the machinery of municipal administration. 1 Dill. Mun. Corp. § 485. The power to issue such paper is usually conferred by charter or statute, and they must be drawn by the proper officer, and all conditions precedent must be strictly complied with. *Trustees v. Cherry*, 8 Ohio St. 565. When required by law to issue a warrant, such officer has

no discretion. His act is merely ministerial. *Campbell v. Polk Co.*, 3 Iowa, 467. The foregoing authorities, it seems to me, satisfactorily establish the fact to be that the section of the charter under consideration is mandatory; that the purpose for which a warrant is issued must appear upon the face of the warrant. It is not necessary, in my judgment, that the section of the statute referred to should go beyond the emphatic language used, and say that, if it does not so appear, the warrant shall be void. In addition to the fact that the authorities establish the provision of the section as mandatory, I think they establish the fact to be that the warrant, omitting the recitation, is void; that it is void upon its face; that it had no tendency to defraud the city government; and no one will contend that, had the office of city treasurer been carefully administered, such a warrant would have been received and paid.

Can it be urged that if the treasurer of the city of Denver, or his deputy, knowing the law, had been honest and faithful in the discharge of his duties, a warrant of the kind in question, failing to contain the matters and things specified by the statute, in order to make it a valid warrant and a voucher in his hands, could possibly have failed to detect the omission in this case? It is equally true that any bona fide purchaser, who might have purchased this warrant without any knowledge of the provisions of the charter, would not have been permitted in any court to recover upon it. It would not be evidence of a legal obligation, and no court, either at law or equity, would have been warranted in the face of the statute in giving judgment against the city upon such a warrant.

There are many decisions wherein municipal powers and warrants issued thereunder have received the consideration of courts, and where they have undoubtedly held that, when the inquiry concerns simply the form of the paper, and there has been a substantial observance of the statutory requirements, the warrants were valid; but none have ever gone to the extent of determining that, when the omission was of matters of substance, the warrant was of any validity. Statutes

which prescribe what a warrant shall contain are universally, and without known exception, held to be mandatory.

It being void, can the crime of forgery be predicated upon it? The force of the cases which hold the statute to be mandatory, and that the warrant, lacking the statutory requirements, is void, and that forgery cannot be predicated upon such a warrant, is to be found in the application of the principle that there must be a legal tendency to deceive, in order that the crime of forgery may be laid. This legal tendency includes also the element of validity or legal sufficiency; without this, as the cases say, there can be no legal tendency to deceive. The legal invalidity, being apparent from an inspection of the document, is lacking the tendency to deceive or harm, and so the following cases hold. In the case of *People v. Shall*, 9 Cow. 778, it was held that an instrument void upon its face, and not shown to be operative by averment, if genuine, is not the subject of forgery. And in the course of the opinion this language is used: "Void things are as no things. Was it ever heard of that the forgery of a *nudum pactum*—a thing which could not be declared on or enforced in any way—is yet indictable? It is the forgery of a shadow." *Rex v. Richards*, Crown Cases, 193; *Rex v. Lyon*, Ib. 255; *Rex v. Burke*, Ib. 497. In the case of *People v. Heed*, 1 Idaho, 531, it was held that, if the original instrument alleged to have been forged or counterfeited is void upon its face, an indictment for forgery will not lie for counterfeiting such an instrument. This was a case where the defendant was charged with forging a county warrant for the sum of \$175. "A writing invalid on its face cannot be the subject of forgery, because it has no legal tendency to effect a fraud. If, therefore, a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making a false statutory one in a form not provided for by the statute, even though it is so like the genuine as to deceive most persons." 2 Bish. Crim. Law, § 538: *Rex v. Moffatt*, Leach, 431; *Rex v. Lyon*, Ib.

597. In the case of *Cunningham v. People*, 11 N. Y. (Supreme Court Rep.) 455, it was held that, "If a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making an instrument in a form not provided by the statute, even though it is so like the genuine one as to be liable to deceive most persons." In *Roode v. State*, 5 Neb. 174, it was announced that, "if an instrument does not purport on the face of it to be good and valid for the purpose for which it was created, it cannot legally be the subject of forgery, if not genuine." In *Rembert v. State*, 53 Ala. 467, it was held that "an instrument which, on its face and in its frame, is illegal or necessarily innocuous from its character, is not the subject of forgery." In *Clarke v. State*, 8 Ohio St. 630, the court said: "An indictment for forgery must not only allege the false making or alteration of a writing specified in the statute, with intent to defraud some named person or body corporate, but it must also appear on the face of the indictment that the fabricated writing, either of itself or in connection with the extrinsic facts averred, is such that, if genuine, it would be valid in the law to prejudice the rights of the person or body corporate thus named." *Barnum v. State*, 15 Ohio St. 717. In the case of *People v. Tomlinson*, 35 Cal. 503, it was held that "the purpose of the statute against forgeries is to protect society against the fabrication, falsification, and the uttering, publishing, and passing of forged instruments, which, if genuine, would establish or defeat some claim, impose some duty, create some liability, or work some prejudice to another in his rights of person or property."

I am unable to conceive how the warrant in question could possibly operate to the prejudice of the city, or of individuals, when we know that it was the duty of the city officers to recognize the omission of a statutory requisite necessary to make of the warrant in question a genuine warrant, and when we know, in addition to that, that persons dealing with corporations must be assumed to know the extent of its cor-

porate powers, and take notice of any restriction in its charter. So, too, are the duties and powers of an officer of a corporation prescribed by statute, and all persons dealing with such officers must take notice of such limitations imposed upon their authority by such statute. Dill. Mun. Corp. § 381. No duty or liability was created against the city of Denver by this warrant, not even to the extent of \$3.50. No action at law would lie upon it. No court of equity would enforce payment of it. No city treasurer would be obligated to recognize it, but, on the contrary, are positively inhibited from paying it. In the case of *Waterman v. State*, 67 Ill. 91, it was held that the writing forged must subject the party affected to legal liability, if genuine. It was urged in the argument that the defendants have not insisted or asserted that they were not guilty of obtaining illegitimately money from the city treasury. This may be admitted, yet this admission does not warrant us in sustaining a conviction for a crime which has not been committed; and as is said in *State v. Corfield*, 26 Pac. Rep. 498, where it was intimated by the state that the defendant could not be punished at all unless for forgery under this statute, the court said: "That is wholly immaterial, so far as the question presented to this court is concerned. * * * We hardly think, however, that our statutes are so barren of remedies as to furnish none in this case." In a more recent case in California, the supreme court of that state has reiterated the rule that the false making of an instrument "merely frivolous, or one which upon its face is clearly void, is not forgery, because from its character it would not have operated to defraud or been intended for that purpose." *People v. Bibby*, 27 Pac. Rep. 781. The only case that I have been able to find which asserts the contrary doctrine is the case of *People v. Eades*, 68 Mo. 150, in which case the court took occasion to say that the case of *People v. Wright*, in 9 Wend. 193, is criticised, if not overruled, in the case of *People v. Stearns*, 21 Wend. 409. A careful reading of this last cited case will show the contrary to be true, for in the opinion in that case

the doctrine of 9 Wend. is reiterated, and the following language is used: "A writing void on its face is a familiar instance of a paper in respect to which forgery cannot be predicated without the averment of some extrinsic circumstances showing that it may become pernicious." *Fadner v. People*, 33 Hun, 240. A large number of cases are cited in support of the doctrine, and the court proceeds further to say: "This is on the presumption that every man knows the law, and is able to appreciate the legal effect of the instrument. Therefore it cannot, in legal contemplation, defraud any one." The opinion quotes from Hammond on the Law of Forgery, as follows: "The settled common-law rule is that, how clear soever the fraudulent purpose, unless the writing is sufficient to accomplish that purpose, it is not forgery, since, with a single exception, actions only, and not evil intentions, are punishable by the English law, and actions only which actually do, or possibly may, produce injustice." *Rollins v. State*, 22 Tex. App. 548; *People v. Galloway*, 17 Wend. 540; *Howell v. State*, 37 Tex. 591.

If the warrant in question had any validity, or was calculated to legally prejudice the corporation, then we should have no hesitancy in saying that forgery might be predicated upon it. But, having reached the conclusion that it is void upon its face and worthless for any purpose, we are reluctantly compelled to hold that it is not a subject of forgery. There can be no legal tendency to harm by the alteration of a paper that has no legal efficacy or validity. It may be said an almost universal test is that, unless the warrant is valid, and suit could be brought on it, then forgery cannot be predicated upon it. The rule is that, "to constitute forgery, the forged instrument must be one which, if genuine, may injure another, and it must appear from the indictment charging the offense that such is its legal character, either from its recital or description of the instrument itself; or, if that does not show it to be so, then by the averment of matter *aliunde* which will show it to be of that character." The indictment fails to comply with this rule. In the case

of *People v. Harrison*, 8 Barb. 562, the identical question here involved was discussed. The court in the opinion said : " This certificate, if genuine, is clearly defective in form and substance, under the statute. It does not set forth that the grantor *acknowledged the execution of the conveyance*. The defect is fatal to the validity of the certificate. The statute is imperative that the officer shall indorse a certificate setting forth, among other things, that the execution of the conveyance was duly acknowledged by the grantor. Without this requisite, no record could be made, and at law no title would pass. The question arising is whether the crime of forgery can be predicated upon such a certificate. I think it cannot. The invalidity of the instrument is apparent upon its face, and, to be the subject of indictment, the certificate should be so far perfect in form and substance as to be valid, if genuine. It is not the falsity of the writing alone, but also its supposed fraudulent effect, which makes a forgery criminal. If the forged instrument is so obviously defective in its form as this is, the law will not presume that it can accomplish the fraud which is perhaps intended. The law presumes a competent knowledge to guard against any such effect, and that no person can be injured thereby in his rights or property. This certificate has doubtless been used to perpetrate a gross wrong upon the grantee named in the conveyance. He has been induced to accept the deed as valid, and to part with the purchase money for the land. It has been used as a false token, by which money has been fraudulently obtained, but the defendant has not been convicted under the statute in relation to cheats. If he had been, the conviction would have been good as well as merited. If the forgery, however, is not such as the law condemns as criminal, it cannot be made so by the want of prudence or circumspection on the part of the person actually defrauded."

Having determined that the provisions of the charter referred to are mandatory, and that the alleged warrant upon which the crime of forging and uttering is based is void, we still have to determine whether the provisions of the statute

are broad enough to cover the offense as alleged in the indictment. Section 775, Gen. St. 1883, provides that "every person who shall falsely make, alter, forge, or counterfeit * * * any auditor's warrant for the payment of money at the treasury, county order * * * or any order or warrant or request for the payment of money, * * * with intent to damage or defraud any person or persons, body politic or corporate, * * * or shall utter, publish, pass, or attempt to pass, as true and genuine, or cause to be uttered, published, passed, or attempted to be passed, as true and genuine, any of the above named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, forged or counterfeited, with intent to damage or defraud any person or persons, body politic or corporate, * * * every person so offending shall be deemed guilty of forgery. * * *" The alleged warrant in question, being void upon its face, has, in my judgment, no greater legal efficacy than a piece of blank paper. It is not a warrant, and cannot be classified as such. It could not be passed, or attempted to be passed, as true and genuine, and is nothing more or less than a false token, if it can be declared that. In the briefs, nor in the oral argument, was our attention called to the statute.

Relative to the power of the court to appoint assistant counsel, I am thoroughly satisfied that the contention of counsel for plaintiffs in error is neither supported by the statute of the state, by authority, nor by sound reason. Every attorney admitted to practice in the state of Colorado is a sworn officer of the court. His obligation, subscribed and sworn to at the time of receiving his certificate as an attorney, is quite as full and complete as that taken by the district attorney. It is true, when acting as special attorneys by direction or permission of the court, they give no bond for the faithful performance of the duties of district attorney; but yet their conduct is susceptible to review by the court appointing them, as well as by the supreme court, and, should it prove to be unbecoming an officer of the court, a penalty

as severe as that nominated in the bond of the district attorney can be inflicted by either court. They are liable to fines and imprisonment and to disbarment, and their action as special counsel is subjected to the immediate control of the court appointing them. The sections of the statute referred to in the argument apply only to the appointment of some one or more attorneys to act as district attorney, and not to the appointment of attorneys to assist in the preparation and prosecution of crimes. The record fails to disclose that the defendants were in any way prejudiced or injured by the appearance of special counsel before the grand jury. It is neither averred, nor was it claimed in argument, that they were so prejudiced or injured. It appears from the record that the district attorney signed and presented the indictment to the court, and it is fair to assume that, while he may not have been present at all times before the grand jury, and did not conduct the examination of witnesses there, yet he supervised and indorsed the action of special counsel appointed to assist him. In the case of *Tull v. State*, 99 Ind. 238, it is held that the court "has inherited discretionary power to appoint attorneys to assist the prosecuting attorney in criminal causes, and to allow a compensation payable out of the county treasury, nor will its action be reviewed save in cases where a clear abuse of discretion appears." This is a well-considered case, and, in my judgment, warrants the conclusion that I have reached upon this point. *State v. Bartlett*, 55 Me. 200; *Jarnagin v. State*, 10 Yerg. 529; *Rounds v. State*, 57 Wis. 45. It is true that this question has frequently been presented to the supreme courts of the various states, but I have failed to find one well-considered case where the power of the court to appoint attorneys to assist the prosecuting attorney has been denied; especially when the record failed to show that the court had not abused the discretionary power vested in it to so appoint.

As to the third and fourth errors, I am clearly of the opinion that the court was warranted in admitting the testimony objected to as well as in admitting the various exhibits

offered by the people. In a case where the crime of forgery is involved, and upon the theory on which the case was tried in the court below, I do not think the defendants have a good ground of complaint, so far as the instructions are concerned. I deem it wholly unnecessary to further consider the errors assigned. Suffice it to say that my examination of the record and authorities lead me to the conclusion that no error, other than the first one above considered, occurred at the trial that would warrant a reversal of the judgment. I think the indictment was insufficient, and that the crime charged in the indictment was not proved. The record in this case discloses a remarkable combination among city officials to procure from the treasury of the city unlawfully large sums of money. A system was agreed upon, and it is evident was for a time successful. That a crime has been committed for which the defendants ought to be punished cannot be doubted. But the question for our consideration, and the one we are called upon to decide, is whether the crime of forgery or uttering a forged paper has been committed. The alleged warrant in question was not used for the purpose of obtaining the money, from the city treasury, but was used for the purpose of accounting for certain moneys that had been unlawfully abstracted by the city officials, and divided among themselves. The judgment of the court below should be reversed. But, inasmuch as the record discloses the facts to be that a crime has been committed by the defendants, they should not be discharged, but remanded to the custody of the sheriff to await the action of the authorities in the premises; and it is so ordered.

BISSELL, J., concurred.

REED, J., (*dissenting.*) Plaintiff in error Raymond was deputy auditor of the city of Denver, Hadley, deputy treasurer, and they were indicted and convicted of forgery. Joslin & Son, merchants, presented to the city council a bill against the city for \$3.50. The bill was allowed, and a war-

rant ordered to be drawn upon the city treasurer for the amount. A warrant was so drawn, which was by Raymond forged or raised to \$303.50, which sum was paid from the city treasury. The guilt of the parties was established beyond controversy,—was, in fact, tacitly conceded,—consequently no question of fact is presented. The questions presented are purely legal, the contention being that, under the established facts, the parties were improperly indicted and convicted of the crime of forgery; that the indictment and conviction should have been for larceny or embezzlement.

Section 87, Crim. Code, (Gen. St., p. 312, § 775; Mills' Ann. St., p. 907, § 1258,) is as follows: "Every person who shall falsely make, alter, forge, or counterfeit any record or other authentic matter of a public nature, or any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, United States treasury note, or United States bond, bank bill, or note, post note, check or draft, bill of exchange, contract, promissory note, duebill for the payment of money or property, receipt for money or property, power of attorney, any auditor's warrant for the payment of money at the treasury, county order, or any accountable receipt, or any order or warrant or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, action, suit, demand, or other thing, real or personal, or any transfer or assurance of money, stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer stock or annuities, or to let, lease, dispose of, alien, or convey any goods or chattels, lands or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, or order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or shall counterfeit or forge the seal or

handwriting of another, with intent to damage or defraud any person or persons, body politic or corporate, whether the said person or persons, body politic or corporate, reside in or belong to this state or not, or shall utter, publish, pass, or attempt to pass, as true and genuine, or cause to be uttered, published, passed, or attempted to be passed, as true and genuine, any of the above named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person or persons, body politic or corporate, whether the said person or persons, body politic or corporate, reside in this state or not, every person so offending shall be deemed guilty of forgery, and upon conviction thereof shall be punished by confinement in the penitentiary for a term not less than one year, nor more than fourteen years." Section 15, art. 3, Amend. Charter of the City of Denver, (Sess. Laws 1885, p. 90,) is the following: "It shall be the duty of the city treasurer to receive, receipt for, and keep the money of the city, and pay out the same only on warrants drawn by order of the city council, signed by the mayor, countersigned and registered by the city auditor, and attested by the city clerk, under the seal of the corporation." By section 22, art. 3, of same act, it is provided: "No money shall be paid out by the city treasurer for any purpose except upon warrants drawn upon him by order of the city council, and signed by the mayor, countersigned and registered by the auditor, and attested by the clerk; and every such warrant shall show on its face the date of its issue, the date of the order of the city council, to whom and for what purpose issued, and from what fund payable; and all city warrants, except those mentioned in the proviso to this section, shall be payable on demand. No warrant shall issue for a sum greater than that actually due to the person in whose favor it shall be drawn; nor shall any city warrant draw a greater rate of interest than six per cent per annum." The following is a copy of the original warrant.

“ Auditor’s Office, City of Denver. No. E. 1,974.

“ Treasurer of the City of Denver: Pay to Joslin & Son or order \$3.50, three 50 dollars, out of any money in the treasury not otherwise appropriated, for ———, and charge the same to miscellaneous fund; and this shall be your voucher. By order of the city council of date Jul. 31, 1890.

“ Issued Aug. 1, 1890.

“ [CITY SEAL.]

“ Attest:

“ W. H. MILBURN,

“ City Clerk.

“ ———

“ Deputy.

Countersigned by

A. A. McKNIGHT,

City Auditor.

———,

Deputy.

WOLFE LONDONER,

Mayor.”

The order as forged and changed read: “ Pay to Joslin & Son or order \$303.50 three hundred three 50 dollars.” It otherwise remained unchanged. It will be observed that in the warrant as drawn there remained an unfilled blank, the warrant failing to state “the purpose for which it was issued.”

There are 37 errors assigned, many of which we do not deem it necessary to examine. The indictment contains twelve counts,—six were for the forgery, and six for uttering, publishing, and passing the forged warrant. I agree with the conclusion reached in the majority opinion of this court, that no serious error occurred in the appointment of special counsel, the joinder of the different counts in the indictment, the general verdict of the jury upon all the counts, and in the admission and rejection of evidence and the instructions of the court. So far the court is unanimous. Upon the main proposition and question involved, I am compelled to differ. It is held in the majority opinion that the warrant (the blank being unfilled) is not in the form prescribed by the city charter, was void upon its face, and could not be the subject of forgery; and upon this ground, and this alone, the conviction and judgment is reversed.

The learned judge who wrote the opinion, in conclusion,

uses the following language: "I am unable to conceive how the warrant in question could possibly operate to the prejudice of the city or of individuals, when we know that it was the duty of the city officer to recognize the omission of a statutory requisite necessary to make of the warrant in question a genuine warrant. The alleged warrant in question, being void upon its face, has, in my judgment, no greater legal efficacy than a piece of blank paper. It is not a warrant and cannot be classified as such. It could not be passed, or attempted to be passed, as true and genuine, and is nothing more or less than a false token, if it can be declared that." With this conclusion it is impossible for me to agree. I do not consider it supported by law nor founded in reason. It is clearly, in my opinion, the result of misapprehension of the law controlling the case,—a confusion or confounding of the law applicable in a civil case, where the payment of the warrant is resisted for informality, with the law controlling in criminal cases. Although at the very outset in the printed argument of plaintiffs in error is stated, "Plaintiffs in error were indicted and convicted under section 775, p. 312, Gen. St., for forging and uttering a certain city warrant of the city of Denver," it is in the opinion treated as an indictment at common law, and numerous common-law authorities are cited and relied upon to sustain the position. The statutory offense is nowhere discussed, nor are we shown to what extent, if at all, the common-law rule is modified by the statute, or the offense taken out of it, or how, if in any respect, our statute differs from those of the states whose decisions are supposed to support the contention.

Of the twenty American cases cited in the main opinion, eight are civil suits, and the balance criminal cases. I cannot conceive how the civil cases cited can have any bearing upon the question whatever. They are suits brought upon irregular warrants against municipal corporations where payment was refused. I concede that such irregularities are, and may be, proper defenses in a civil suit; but the distinc-

tion drawn between civil actions for the collection of warrants and cases where forgery can be sustained is so marked and well defined that they should never be deemed parallel or analogous. Almost from time immemorial it has been held that a paper need not be enforceable in a court of law to make it the subject of forgery. See *Crooke's Case*, 2 Strange, 901; *Deakin's Case*, 1 Sid. 142; *Coate's Case*, 1 Ld. Raym. 787; *Sterling's Case*, 1 Leach, 99; *Coogan's Case*, Id. 449; *King v. Buttery*, 1 Russ. & R. 342; *Rex v. Avery*, 8 Car. & P. 596; *Rex v. Barber*, 1 Car. & K. 434. See *Hawkesworth's Case*, 1 Leach, 257. He was indicted for forging a bill of exchange. Objection was taken that it was not stamped pursuant to St. 23, Geo. III., c. 33. That statute not only required the bill to be stamped, but provided "that a bill without a stamp shall not be pleaded, or given in evidence, or be available in law or equity." Our statute requires the insertion of for what purpose issued, but it is not declared or made void or invalid by the omission, as in that statute. In that case, counsel for prisoner urged his contention in language nearly identical with that cited above from the majority opinion: "That it was not a bill of exchange, but a piece of waste paper, incapable of becoming the subject of either fraud or felony; that the party who took it must at the time have known that it was not a legal bill of exchange, or he must have been grossly negligent, the defect being visible upon the face of it." But Buller, J. overruled the objection, and said that the false instrument had the semblance of a bill of exchange, and was negotiated by the *prisoner as such*. And, on a case reserved, the judges *were all of opinion that the prisoner was properly convicted*; holding that, although it could not be pleaded or given in evidence or be available in law or equity, "*signified only it should not be made use of to recover the debt*," but it did not affect the law of forgery. Shortly after the same question was presented in *Lee's Case*, 1 Leach, 258. "*The question underwent much consideration, and was debated by the judges in the course of several terms*," the court holding that it made no

alteration in the law of forgery, "but only to provide that the instrument should not be available for the purpose of recovering on it in a court of justice;" *and they considered that*, in order to constitute forgery, it was not necessary that the instrument should be available;" and this has been the rule of law down to the present time, and still is. I do not hesitate to say that I do not believe an authority can be found outside of the opinion in this case, and that of *People v. Heed*, 1 Idaho, 531, (written by a blacksmith,) where it was held that forgery could not be predicated on an instrument not enforceable at law.

Was the instrument in question at common law void, so that its forgery could not be a legal basis for an indictment, as held in the majority opinion? The earliest well-considered and authentic case reported at length is *King v. Ward*, 2 Ld. Raym. 1461, (A. D. 1726.) It appears that the Duke of Buckingham had in store with one Ambrose Newton a large quantity of alum. The certificate was delivered to Ward as agent for purposes of sale. Upon the back of such certificate the following indorsement was forged:

Schedule.	Tons	C	Mr. John Ward: I do hereby order you to charge the quantity of six hundred and sixty tons and one quarter of allum to my account, part of the quantity here mentioned in this certificate, and out of the money arising by the sale of the allum in your hand pay to Mr. W. Ward and yourself ten pounds for every ton according to agreement, and for your so doing this shall be your discharge.
	660	5	
	325	5	
	975	10	

BUCKINGHAM, April 30, 1706.

It was objected—First. That it was no forgery at common law; that the information was based upon the common law, and not upon St. 5 Eliz., c. 14. Second. It was insisted that at common law forgery must be of a record or something of a public character; that counterfeiting writings of a private character was not forgery. Third. "It was further argued that a forgery is not punishable, unless it is to the prejudice of some person." On the first two points the court held unanimously that the offense was indictable at common law.

Passing upon the third point, the court said, (2 Ld. Raym. 1466:) " Upon that statute (5 Eliz., c. 14) no fact was punishable, but where the offender had carried his fraud into execution, and got the money or goods into his possession, whereby the party defrauded was actually prejudiced. But a man is punishable for a forgery, *if it may be prejudicial*, though the mischief is prevented by the discovery of the forgery. And that, therefore, is an answer to another objection made by the defendant's counsel, that it does not appear the Duke of B. was actually prejudiced, it not being averred that the delivery of the alum was avoided in fact by this forged indorsement; for, if he might be prejudiced by it, that makes the forgery an offense, for which an indictment would lie at common law; as if A. forges a bond in B.'s name, though B. is never obliged to pay the money, an indictment without all question will lie at common law. And for these reasons the court were clear of opinion that this offense, of forging an indorsement on the back of the certificate, whereby the Duke of B. might be defrauded of the alum, was a forgery, for which this information will lie at common law." And at page 1469: " But, as to this, the court held it not necessary to lay a publication in the first information, for the forgery was punishable, though the party was not actually prejudiced, if he might be prejudiced by it, and therefore they held it good, though the information did not show the duke was actually defrauded of the alum; and for the same reason there was no necessity to lay that the writing was published." The conviction was unanimously held good by all the judges of court of king's bench.

I review this case at some length from the fact that it has been the basis of many more modern decisions upon which counsel rely. It will at once be seen that to take a forged paper out of the operation of the law, as there decided, it must be upon its face so invalid and void as to be worthless; in the language of the judges, "*a writing of no consequence, or that could prejudice nobody.*" "*If he might be prejudiced by it, that makes the forgery an offense* for which an indictment

would lie at common law." Following that case was *Moffatt's Case*, 1 Leach, 431, (A. D. 1787.) Moffat was indicted for forging the name of the drawer, and an acceptance on a bill of exchange. It was objected that the bill of exchange was void. By the statutes of 15 Geo. III., c. 51, and 17 Geo. III., c. 30, it is provided that the place of residence of the payee and of the indorsee should be stated in the bill and in the indorsement. It was also declared by such statutes that every bill of exchange and indorsement, *failing to comply with such requirements, should be void*. The statutes then impose a penalty of from £5 to £20 upon any person who shall "utter, publish, or negotiate notes, bills of exchange, etc., contrary to the method above prescribed." The bill of exchange was held void under the statutes, and that an indictment for forgery would not lie—it was a purely statutory proceeding. Comment is unnecessary. The paper was declared void by statute—was not only absolutely void upon its face, but subjected any party to a penalty who attempted to pass it; and, being absolutely invalid and worthless, the decision was in keeping with *King v. Ward*, and has no bearing in this case. In *Lyon's Case*, 2 Leach, 597, the prisoner was indicted for forging a receipt for money. Held that no conviction could be had, as it was not a receipt for money, within St. 2 Geo. II., c. 2, not complying with the statutory requirements. Mr. Justice Grose said: "For if he had merely looked at it he must have perceived it was nothing more than waste paper." The provisions of the statute are not stated, but it is clear that the statute was similar to that in regard to notes and bills of exchange. *King v. Richards*, Russ. & R. 193, was an indictment for forging an order for money from the navy department. There was no payee. Held by the judges, Lord Mansfield dissenting, that it was not an order for money, as no payee was named, and that the indictment could not be sustained. *King v. Randall*, Russ. & R. 195, (A. D. 1811,) following *King v. Richards*, that the indictment for forging could not be sustained on a bill of exchange without a payee, it having been drawn

“payable to ——— or order.” Held not to be a bill of exchange. *King v. Lyon*, Russ. & R. 255, (A. D. 1818,) was an indictment of a power of attorney to receive prize money. The forged power of attorney did not comply in form with the requirements of St. 31 Geo. II., c. 10. Defendant was tried before Lord Ellenborough, and convicted. Baron Graham and Bayley, J., maintained that, not being in form as required by statute, it was void, “and no person could be guilty of a capital crime in forging it.” But the majority of the court *held the conviction right; that it was not a void instrument*, though lacking in statutory requirements; “it might be the subject of a criminal prosecution; that a payment made under it to the use of the petty officer would be good as against him; and that the attorney under it might bring an action for the prize money or execute a release;” clearly holding that, *not being absolutely void for all purposes, the conviction could be maintained*. In *King v. Pateman*, Russ. & P. 475, a note for one pound was raised to £40, but the signature was cut off. Held it was not a promissory note *under the statute* for want of a signature, and the conviction wrong. In *King v. Burke*, Russ. & R. 496, (A. D. 1822,) the paper was held a mere nullity. It was charged in the indictment *as a promissory note*. Held, that it was not such in any legal sense; hence that the indictment was not sustained.

It will be observed that in several of the cases cited and relied upon the judgment was based solely upon the statutes, and upon the technical misdescription of the instrument alleged to have been forged, and turned entirely upon a question of criminal pleading. It will also be observed that most of the cases were under statutes minutely designating the requirements of each paper, to render it valid, *and declaring them void*, when lacking any designated requirement. This I consider a sufficient review of the old English authorities. Among the earlier cases in this country is *People v. Shall*, 9 Cow. 778, (A. D. 1829.) Shall was indicted for forging the following: “Three months after date I promise to pay Se-

bastian I. Shall or bearer the sum of three dollars in shoe-making at cash price, the work to be done at his dwelling house near Simon Vrooman, in Minden. DAVID W. HOUGHTALING. Minden, August 24th, 1826." He was indicted for forging "a certain promissory note of hand." There was no averment of any extrinsic matter. Held, it was not a promissory note. The court said: "It expresses no value received nor any consideration whatever, and no action could be maintained upon it if genuine." "It is *utterly void* of itself as a common-law contract." It is characterized as a writing void in itself and so appearing in the indictment. Great reliance is placed upon this case by counsel. One fact is apparently overlooked. It is not the decision of a court of last resort, but of one circuit judge in oyer and terminer. Certain portions of the opinion are cited, which, detached, support the contention of counsel for plaintiff. Carefully examined and taken as a whole, the case is against them. At page 784 it is said: "I have shown that the paper forged, if genuine, would be a mere nullity for any purpose." In Bish. Crim. Law, that able author states the following conclusion as the result of his investigation, (2 Bish. Crim. Law, § 538:) "A writing invalid on its face cannot be the subject of forgery *because it has no legal tendency to effect a fraud.*" The converse of the proposition must be equally true. *Any paper that has the legal tendency to effect a fraud may be the subject of forgery.* It need not effect its purpose; the fraud need not be perpetrated; no one need be injured. If the paper forged is not absolutely worthless for all legal purposes, forgery may be committed. To take it out, it must be, in the language of the judges in *Ward's Case*, (2 Lord Raym., *supra*,) "*a writing of no consequence, that could prejudice nobody;*" *contra*, "if a party might be prejudiced by it." This is the test, and this is fully borne out in other sections of Mr. Bishop's. In section 535 it is said: "The forgery of any writing by which a person might be prejudiced was punishable as forgery at common law." Again, same section: "Plainly, however, the writing is sufficient at common law,

if, were it genuine, it would subject the maker to any liability, * * * either in the form of an action of assumpsit, * * * or to an action on the case in the nature of deceit, as a false representation made to defraud." The conclusion is irresistible that the writing must be absolutely void and worthless for all purposes not to be the subject of forgery. See Whart. Crim. Law, §§ 691, 692, 695, 739; *Ames Case*, 2 Greenl. 365; *Com. v. Costello*, 120 Mass. 358; *Foulkes v. Com.*, 2 Rob. (Va.) 836; *State v. Eades*, 68 Mo. 150; *Jackson v. Weisiger*, 2 B. Mon. 214; *Garmire v. State*, 104 Ind. 444; *People v. Harrison*, 8 Barb. 560; *U. S. v. Turner*, 7 Pet. 132. Take Mr. Bishop's definition of "forgery," (1 Bish. Crim. Law, § 572:) "It is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might *apparently* be of legal efficacy or the foundation of a legal liability." In 2 Greenl. Ev. § 103, it is said: "It [forgery] may be committed of any writing which, if genuine, would operate as the foundation of another man's liability or the evidence of his right." In 4 Bl. Comm. 247, and 2 Russ. Crimes, 708, "forgery" is defined: "A false making or making *malo animo* of any written instrument for the purpose of fraud and deceit." Like all other offenses, intention seems to be an important factor. It must be with the intention of deceiving and perpetrating a fraud; hence the paper forged must be so apparently invalid and worthless upon its face as to negative fraudulent intention, or an indictment will lie.

There is no provision in the statute declaring warrants void for want of the required form. Unless the statute makes the instrument void, an indictment will lie for the forgery,—*Thompson v. State*, 9 Ohio St. 354; *People v. Bibby*, (Cal.) 27 Pac. Rep. 781; *State v. Eades, supra*,—and in many cases it has been held forgery could be predicated upon an instrument declared void by statute, and such is the English doctrine. See cases reviewed above, and 2 Russ. Crimes 750–755.

A brief synopsis of the facts in this case is as follows: The city was legally indebted to Joslin & Son \$3.50. A bill was

presented, laid before the city council, allowed, and a warrant ordered drawn for the amount. It was the duty of the city auditor to draw the warrant. It was drawn by the deputy, signed by the mayor, countersigned by the auditor, attested by the clerk, and bore the city seal, bore the date of the allowance by the city council, and the date of its issue, and name of the payee. In the ordinary course of business, it should have been delivered to the payee, was the property of Joslin & Son, and should have been placed in their possession. Here was a formal and legal admission of the existing indebtedness of the city, executed with all solemnity by all parties required to participate in it, and more than complying with all the requirements necessary to give it validity and authorize its payment by the treasurer, under section 15, art. 3, of the city charter. It is idle to attempt to maintain that by a trivial, technical omission in the body of it, accidentally or purposely made by one of the defendants, in a matter that in no way affected Joslin & Son, and with which they had nothing to do, rendered the paper utterly invalid, void, and worthless for all purposes. By it the liability of the city to pay was, by its own acts, fixed beyond controversy. Had the treasurer refused payment on account of the omission, it being the duty of the city official to make it technically correct, the omission could have been readily supplied; refusing, he could be compelled by a court to insert the clause. The paper was forged and raised to \$303.50 and paid, \$300 being appropriated by the defendants. There is no question as to the fraudulent intention, and all resulted in success. Regardless of the statute, under the authorities, the conclusion is irresistible that the paper in question was the subject of forgery at common law, and the conviction proper.

In the majority opinion it is held, and much space is devoted to show, that section 22, art. 3, (Charter of Denver,) requiring a warrant drawn upon the treasurer to show on its face "for what purpose issued," was mandatory. In my view of the case, it is immaterial whether mandatory or directory. The great weight of authority is to the effect

that it is directory. It appears to be a provision inserted to assist the city officers in administering affairs and in keeping the accounts, etc. There is nothing in the statute making the validity of a warrant depend upon the insertion of the clause, nor declaring it void or invalid when omitted. In the administration of city affairs, after the allowance of the claim by the city council and the ordering of the warrant, it was the duty of the auditor to draw the warrant. If mandatory at all, it was mandatory upon the city officers. It was a provision in no way affecting the creditor nor the validity of the warrant issued to him as an evidence of indebtedness of the city. It is well settled, upon unquestioned authority, that where the paper alleged to have been forged was the act and paper of the corporation, evidence was admissible to show the usual course of business in such matters. In this case proof was introduced to establish the fact that, if not customary, it was, at least, common, for the city officials to disregard the statutory requirement of inserting the purpose for which the warrant was drawn. The fact that after the warrant was drawn it was countersigned by the city auditor, signed and attested by the city clerk, and the seal of the city attached, signed and attested by the mayor, and paid by the treasurer, conclusively shows that the statutory requirement was disregarded in the transaction of business, and that the officers guilty of the offense knew that in the ordinary course of business it would be paid with the blank unfilled. In other words the officers guilty of the offense, instead of drawing a void, invalid paper, drew one valid and regular, known to them to be so—one, as subsequent payment proved, capable of fully effecting the fraud contemplated.

It is obvious that neither the other city official nor the treasurer regarded that clause as mandatory, and it was persistently disregarded. There is one section of the charter entirely overlooked in the principal opinion, neither cited nor referred to, (section 15, Id. "City Treasurer.") By it, it will be seen the treasurer was authorized to pay out the city

money "only on warrants drawn by order of the city council, signed by the mayor, countersigned and registered by the city auditor, and attested by the city clerk under the seal of the corporation." Here we have clearly and fully stated all that is necessary to the validity of the warrant to authorize its payment by the treasurer. This section is in no way referred to in section 22, where the same requirements are repeated and further ones added, among which is "the purposes for which drawn." I am at a loss to know why section 15 was entirely ignored in the principal opinion, being one specially relating to the city treasurer, by name and designation, and preceding the one relied upon in the same article. We have, in effect, the reversal of a proper conviction on what to me appears to be a very trifling, frivolous, and technical ground to shield parties, confessedly guilty, from the consequences of their crime. Law is supposed to be a science based upon reason and common sense. Such defenses cannot, morally, appeal to any court; legally, I have attempted to show their inadequacy. Where there is doubt in regard to the guilt of a party, and whether the conviction was warranted by the facts, courts will hesitate and construe all questions favorably to the defendant. It is necessary to protect the innocent from punishment—but where parties are notoriously guilty, and confessedly so under such circumstances as are presented in this case, courts should not exhaust their energy and ingenuity in magnifying a trivial legal technicality into a ground for reversal to shield culprits from well-merited punishment. To a court or layman the proposition is this: The officers of a corporation, having willfully, intentionally, and persistently violated a statute obligatory only upon themselves, leave out a single clause known to be unnecessary to secure the money, secure the money by the forgery, then set up such willful violation of a statute, by them declared to be mandatory, to defeat a conviction for a crime established beyond question.

This court has in this case succeeded in doing what no other court, as far as I am informed ever attempted—allow-

ing a defendant, guilty of two admitted frauds, to set one off as a defense to the other and neutralize both. It does not appear to have been thought of or tried as an experiment, as far as I can find, since *Morton's Case*, 2 East, C. L. 955, 956; 1 Leach, 258, (A. D. 1783.) The court there thought it could not be done. The judges said: "It would be a strange defense to admit in a court of justice that, because a man had forged a stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from punishment due to another." In this case the experiment appears to have been successful. It is not, as I have attempted to show, necessary to place an affirmance of the judgment upon the ground last indicated. If it were necessary, I should not hesitate to declare that a wanton violation of a statute could not be interposed by the same parties to shield them from punishment for a criminal offense.

It is conceded that the parties were guilty of larceny or embezzlement of the public funds, and it is urged that the prosecution was misconceived,—was for the wrong offense; that it should have been for larceny. It is only necessary to say that the two are separate and distinct offenses, each in its way complete, and that prosecution for one cannot take the place of, nor be substituted for, the other; and that a party guilty of two crimes in the same transaction, for either or both of which a prosecution would lie, cannot usually make his election. So far I have followed the reasoning, grounds, and argument in the principal opinion, in which only the *forgery* as a common-law crime is discussed. In the legal argument and brief of counsel for plaintiffs in error it is asserted: "The plaintiffs in error were indicted and convicted under section 775, p. 812, Gen. St., for forging and uttering a certain warrant," etc. Neither the statutory offense of forgery, nor the uttering of forged paper, is anywhere discussed in the principal opinion. They are "sponged" out, and then ignored, by this hasty paragraph: "In the briefs, nor in the oral argument, was our attention *called to the statute*; and we

are warranted in assuming that the attorneys on behalf of the people did not believe *its provisions were broad enough to cover the crime of forgery, based upon an absolutely void instrument, void upon its face.*" Three times upon one page the learned judge reiterates the statement that the warrant in question was absolutely void,—void upon its face, etc. This rests entirely upon an assumption. No counsel in argument had the temerity to claim that it was "absolutely void,"—void upon its face and worthless. To so assert is to assume it void and worthless for all purposes, and no authority has been, or can be, produced to warrant the assumption. I maintain, backed by all respectable authority, that it was not only not void for all purposes, but was valid for all purposes. At any rate, having forged and uttered it and secured the proceeds, it was an adequate basis for an indictment and conviction. The statutory question on an indictment based upon the statute cannot be thus summarily disposed of. No matter what inference the court may have drawn from the conduct of counsel regarding their view of the breadth of the statute, it becomes the duty of the court to examine it and determine its breadth. It, as far as the crime of forgery, as known to the common law, is concerned, is much broader than the common law. Another fact will be observed that takes the statutory crime of forgery entirely out of the domain of the common law. The statute makes the uttering, publishing, and passing of a paper, "knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person or persons, body politic or corporate, *forgery.*" The indictment in six counts charges the uttering, publishing, and passing, and the uncontradicted evidence not only establishes the fact, but the further fact that by the same conspiracy, by forgery and the payment of forged warrants, the robbery of the people through the city treasury was unlimited in extent. In the early statute of Great Britain, and perhaps at common law, the forging and uttering—the making of the false paper and the successful perpetration of the fraud by receiving the proceeds—were

necessary to convict. Shortly after the two were separated, and each made a distinct offense subjecting to punishment; but while made separate and distinct offenses, so that either might be punished alone, where the facts warranted, they might be laid in the same indictment, and a conviction be had for either or both; but our statute makes both the same offense, and the offender can be legally convicted of forgery on either. The language of our statute is, section 87, "Every person who shall falsely make, alter, forge, or counterfeit," etc., "*or shall utter, publish, pass,*" etc., "knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud." etc., "*every person so offending shall be deemed guilty of forgery,* and upon conviction," etc. It is strange that this important feature should not have been considered in the main opinion. By the disjunctive "*or*" separating the former part of the section from the latter, though both offenses are forgery, they are separate and distinct crimes. The party uttering need not be the party who forged. To complete and perfect the offense, it is only necessary—first, that the paper should be forged or altered; second, that the party passing it knew it to be false, forged, and fraudulent; third, that he should utter it or attempt to utter it, with intent to damage or defraud, etc. In regard to the guilty knowledge and the successful perpetration of the crime by uttering and receiving the money there is no question; hence, regardless of the form or regularity of the paper, the offense of forgery, by the uttering alone, was complete. The successful perpetration of the crime by uttering the paper and receiving the proceeds eliminates every question discussed in the main opinion, and warranted the conviction, regardless of the question upon which the conviction is reversed. I am at a loss to know how, in view of the facts of this case uncontradicted and conceded, the following paragraph could have found a place in the main opinion, unless intended to be satirical: "I am unable to conceive how the warrant in question could possibly operate to the prejudice of the city or individuals, *when we know that it was the duty of the city officer to recognize the omission of a statutory requi-*

site necessary to make the warrant in question a genuine warrant." What are we to infer from the language used? It may be inconceivable to my learned associate, but that does not alter the fact. The criminal and moral turpitude of high city officials intrusted with millions of the people's money was not supposable, hardly conceivable, until the facts were established; but, when the crimes of forgery and the embezzlement of the people's money was proved, it is not supposable that their moral rectitude and sense of duty were so great as to overcome the criminal intention to get the money, and compel them to "recognize the omission of a statutory requisite." If he means that the guilty parties were so imbued with the sense of duty, and so controlled by principles of morality, as city officers, as to render the overlooking of the omission impossible, then I can only say the inference is contradicted by every page of the record, and that it is not astonishing or impossible that persons who could perpetrate forgery and grand larceny should fail to "recognize the omission of a statutory requisite;" and, although he was "unable to conceive how the warrant in question could possibly operate to the prejudice of the city or individuals," I can only say it does not depend upon his ability, comprehension, or want of comprehension. The fact remains that the identical warrant did prejudice the city, and through it individuals, to the extent of \$300, and like warrants, probably, to the extent of as many thousands.

My conclusions are—First, that the crime of forgery at common law was fully established, and the conviction right; second, that the crime of forgery under the first part of our statute was fully established, and the conviction right; third, that the "*uttering*" by our statute was forgery, regardless of the form of the paper, and regardless of the questions discussed in the majority opinion, and the conviction right; fourth, that, if confessed criminals and public robbers are to go unpunished under the law, facts, and circumstances of this case, all law for the punishment of crime should be repealed, and courts abolished.

Reversed.

SEPTEMBER TERM, 1892.

WOODWARD, PLAINTIFF IN ERROR, v. PEOPLE'S NATIONAL
BANK, ET AL. DEFENDANTS IN ERROR.

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1. EXEMPTION—HOMESTEAD.

Every householder, being the head of a family, is by statute entitled to hold a homestead not exceeding in value \$2,000, exempt from execution and attachment arising from any debt, contract or civil obligation incurred after Feb. 1, 1862, provided he resides thereon and designates it of record as such as required by law.

2. SAME—JUDGMENT LIEN.

The right to hold as a homestead a parcel of land, the title to which the occupant has acquired under the pre-emption laws, is not impaired by reason of the fact that a transcript of a judgment against him had been filed before he acquired title and designated the land as a homestead.

3. SAME.

A mere judgment lien upon land does not prevent the occupant from designating it as a homestead and holding it exempt from an execution issued upon the judgment after such designation.

Error to the District Court of Arapahoe County.

Mr. F. J. MOTT, for plaintiff in error.

Mr. W. J. WEEBER, for defendants in error.

REED, J., delivered the opinion of the court.

Plaintiff in error was plaintiff below. The suit was brought to restrain the People's National Bank, a judgment creditor, and Leonard Jackson, the sheriff of El Paso county, from selling certain lands of the plaintiff in El Paso county upon execution in favor of the bank. The land in question was an unoccupied portion of the public domain, until about the 18th day of October, 1890, when plaintiff settled upon it and made a filing under the pre-emption laws of the United

States, and since such date he has been residing upon it with his family. On May 14, 1891, he made proof of rights as required by law, made the necessary payment to secure the title and receive a receiver's receipt, which was recorded; a few days afterwards (date not given, but prior to the 15th day of July, 1891,) he caused the word "Homestead" to be entered of record on the margin of the record of the receiver's certificate, and signed his name as required by law. On Feb. 16, 1891, the judgment was obtained, and on the 21st day of February, 1891, a transcript of the judgment was filed in El Paso county. On July 15, 1891, an execution was sued out, directed to the sheriff of El Paso county (Jackson, the defendant), who on the 12th day of September following, levied upon the land and advertised it for sale. The suit was brought to enjoin the sale; a temporary injunction granted, which was afterwards dissolved, and the sale allowed to proceed. The case is brought up for review.

The facts being conceded, only one question is presented: Was the land exempt from sale under the execution?

The statute is as follows: "Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred after the first day of February, in the year of our Lord one thousand eight hundred and sixty-eight." Mills. Ann. Stat. § 3132, p. 1301.

"To entitle any person to the benefit of this act, he shall cause the word 'homestead' to be entered of record in the margin of his recorded title to the same, which marginal entry shall be signed by the owner making such entry and attested by the clerk and recorder of the county in which the premises in question are situated, together with the date and time of day upon which such marginal entry is so made." Mills. Ann. Stat. § 3133, p. 1303.

It is contended by the defendants in error that, having obtained judgment and filed a transcript before plaintiff ac-

quired title and designated the land as a homestead, the statutory lien of the judgment creditor attached upon the acquiring of the title, and such lien was superior to the homestead right, and the subsequent designation of it as a homestead did not exempt it from the operation of the judgment lien.

We cannot adopt this theory of the law. Its effect would be to defeat the evident intention of the legislature, and make the exemption in most cases nugatory. The design of the statute was to secure to the householder a home for himself and family, regardless of his financial condition, whether solvent or insolvent.

The statute gives to a judgment creditor a general lien upon all the real estate owned or afterward acquired, but this general lien must yield to the special law; and the homestead law, at least for the time that the land is occupied and designated as a homestead, withdraws the particular tract from the operation of the general lien. There are two well-defined lines of decision in regard to the operation and effect of the homestead exemption statute upon that giving a general judgment lien: First, that no judgment lien attaches to the homestead; second, that the lien attached and remained, but was in abeyance so long as the requirements of the homestead act were complied with. The former is the theory of the law as adopted by the supreme court of this state. *Barnett v. Knight*, 7 Colo. 365.

It is immaterial for the purposes of this case, which theory is adopted, although we consider the one adopted the better in reason. If no lien attaches to the homestead, or if it remains and is held in abeyance, in the first instance, the general lien not having been enforced, and made specific by the levy of an execution or attachment before the designation as a homestead, the general lien is removed, or the parcel of land is withdrawn from its operation. If the second theory were to prevail the effect would be the same in this case; it would be suspended and could not be enforced, under the facts shown in the pleadings. Both statutes may stand to-

gether; the general judgment lien attaches until the legal designation of the land as a homestead,—such designation withdraws it from the operation of the general lien that attaches to all the land owned.

The language of the statute is clear and unequivocal—needs no construction. The words “arising from any debt, contract or civil obligation” are sufficiently broad and comprehensive to embrace any and all forms of indebtedness, including judgments. The homestead is “exempt from execution or attachment.” The property in question not having been subjected specifically to the judgment lien by the levy of an execution before it was withdrawn as a homestead, it was exempted from the levy of the execution. To construe the statute otherwise would defeat its obvious intention. If the statute needed construction, many authorities might be cited in support of the position here taken.

In *Green v. Marks*, 25 Ill. 221, it was held, “that the judgment lien did not attach to the homestead; *that its exemption from levy and sale* placed it beyond the operation of a lien;” also, “that while it remained exempt it was in the same situation as though the judgment had never existed.” This case was followed by *Bliss v. Clark*, 39 Ill. 590, where it was held that the property *was not subject to a lien, a levy or a sale while it remained a homestead.*

The plaintiff in error having designated the land as homestead before the execution was sued out, the property was exempt from its operation.

The decree of the district court must be reversed and cause remanded.

Reversed.

THE BOULDER INVESTMENT COMPANY, PLAINTIFF IN ERROR,
v. FRIES, DEFENDANT IN ERROR.

In the absence of limitation upon the power and discretion which the agent may exercise in regard to location, price, terms or time of payment in the purchase of real estate, the principal will be bound by the contract of the agent, and cannot recover any part of the purchase money paid upon the contract.

Error to the County Court of Arapahoe County.

Mr. GEORGE H. GRAY, for plaintiff in error.

Mr. LEONIDAS WALKER, for defendant in error.

BISSELL, J., delivered the opinion of the court.

In 1891 The Boulder Investment Company were the owners of the "Newland Addition" to the town of Boulder. During the month of April of that year the defendant in error, Lavina Fries, desired to purchase some lots which the company offered for sale in that addition. Being out of the state, she corresponded with her friend Mrs. Bixby, and invoked her kindly offices to select the lots and make the purchase. There is no dispute concerning the agency, and it is very plain that whatever was done with reference to the purchase on behalf of Mrs. Fries was done by Mrs. Bixby. The whole controversy seems to turn upon the question whether there were any such limitations on the power of the agent as would authorize Mrs. Fries to recede from the bargain which was made on her behalf, and to recover the money paid the company on account of the lots. The terms of the sale were fifty dollars (\$50.00) cash, one hundred and fifty dollars (\$150.00) before the 21st of May, 1891, and the balance in two notes maturing in six months and a year respectively. The purchase included four lots, 21 to 24 in block 19; at least such were the provisions of the contract executed

on behalf of Mrs. Fries by her friend Mrs. Bixby. After this contract was made, considerable correspondence was had between the two ladies, and Mrs. Fries expressed a preference to secure some cheaper lots at three hundred per piece, in place of those contracted for four hundred, on which the payment was made. The company did not seem adverse to the transfer, and readily gave a consent in writing to the substitution of the three hundred dollar lots, providing the option was exercised prior to the 21st day of May. Nothing was done under this consent. Mrs. Fries ultimately refused to take the lots at all, or carry out the contract, and brought this suit to recover the fifty dollars (\$50.00) which had been paid as part of the purchase money.

The suit was brought in a justice's court, appealed to the county court, whence it was brought here by the company against whom judgment was rendered. On exactly what theory the courts adjudged her entitled to recover the money, it is impossible to perceive. It is of course true that if the agent exceeded her authority or failed to pursue the instructions given her by the principal with reference to the purchase, and the circumstances were such as to charge the third party with knowledge in respect of these matters, a recovery might possibly be had even in a case like the present. This, however, is not true according to the record. The only instructions which Mrs. Bixby received from her principal were couched in the form of a request to visit the addition, locate and select some lots, and pay the fifty dollars as part of the purchase price when the selection should be made. There was an utter absence of limitations upon the discretion which the agent might exercise, either in regard to location, price, terms or time of payment. The agency was a broad and general one, which gave full discretion to the representative, and whatever might be done by her under those circumstances must undoubtedly be held to bind the principal. There was no attempt made on the trial to show any failure of consideration, any defects in the title, or any other legitimate reason entitling Mrs. Fries to

withdraw from the contract and recover the money. In the absence of some proof of that sort, it must be held that she could not recover the money which she had paid the company. Failing to prove some legal reason authorizing her to rescind the contract, she must be remediless in this form of an action.

The judgment is entirely unsupported by the evidence, and cannot be maintained under the law, and must accordingly be reversed.

Reversed.

**METCALF, PLAINTIFF IN ERROR, v. FISHER, TREASURER,
ETC., DEFENDANT IN ERROR.**

1. RANGE CATTLE, WHERE RETURNED FOR TAXATION.

It is the duty of the owner of cattle ranging in different counties to make return to the assessor of each county the number owned by him in such county on the first day of May of each year. In case of his failure so to do, the assessor should assess them, acting on such information as he may possess.

2. ERRONEOUS ASSESSMENT, WHO MAY CORRECT.

The board of county commissioners, as a board of equalization, has almost unlimited power to correct errors occurring in assessments either before or after payment of taxes thereon.

3. INJUNCTION NOT THE REMEDY.

An injunction cannot be maintained against a county treasurer to restrain him from collecting a tax by distraint of property on the ground that the assessment was erroneous or excessive.

Error to the District Court of Otero County.

Mr. H. RIDDELL and Messrs. STARKWEATHER & DIXON,
for plaintiff in error.

Mr. G. M. DAMERON and Mr. B. F. McDANIEL, for de-
fendant in error

RICHMOND, P. J., delivered the opinion of the court.

This is an application for an injunction to restrain the collection of taxes. Plaintiff in error, Henry H. Metcalf, filed his complaint in the district court of Otero county alleging:

“That the defendant herein is the duly elected qualified county treasurer of the county of Otero, and state of Colorado.

That the plaintiff is, and for more than ten years last past was, the owner of a large number of cattle, the exact number thereof plaintiff is not able to definitely state, but plaintiff alleges that of his best knowledge, information and belief the number of said cattle owned by him in this state is three thousand (3000).

That plaintiff, during all of said period, lived and now lives at or near River Bend, in the county of Elbert, and state of Colorado, and that his ‘home ranch,’ or headquarters where he cares for, and around which he intends to keep and graze his said cattle, is at and around said River Bend, in said county of Elbert.

That during the winter seasons and during other seasons, without the procurement or intention of the plaintiff, said cattle wander away from the vicinity of said River Bend and from Elbert county into other neighboring counties, but that at such times as are convenient, and particularly at such times as the weather will permit, plaintiff is accustomed to and does round up and drive back said cattle to the vicinity of said River Bend and into said Elbert county, and particularly does he at such times round up and drive back said cattle from the county of Otero.

That in some years the winter season being more severe than in other years, the plaintiff is unable to round up and drive back his cattle as aforesaid as soon as he is able to and does round them up in milder seasons, but plaintiff says that his intention is, in every year, to round up and drive back his said cattle to and about said River Bend about the month of April, though in some years he has been prevented for the

reasons aforesaid from driving his cattle back to his said "home ranch" until in May.

That by reason of the great number of cattle owned by plaintiff he is not able at any particular time to say definitely where each and every head of said cattle are, or whether they are all in said Elbert county, or whether certain of them are in other counties; but plaintiff intends, as aforesaid, to keep all of them in and around said River Bend and in said Elbert county, and that if any part of said cattle at any time go into said county of Otero the same is contrary to the intention of the plaintiff and is accidental.

That the county assessor or the county treasurer or the board of county commissioners or some other officer of the said county of Otero, charged with the assessment or collection of the revenue thereof, claims that a large part of the cattle of this plaintiff was in the county of Otero on the first day of May, 1890, and thereupon, at some time during the said year of 1890, a tax was assessed against said cattle in the said county of Otero for the year 1890, but that plaintiff had no knowledge that said cattle were in the county of Otero on said first day of May, 1890, and that if said cattle or any part thereof were in said county of Otero on the first day of May, 1890, their being there was temporary and accidental and without the knowledge or consent of plaintiff, and that he was never notified by any of the officers of said county of Otero, or by any one else, that a tax had been levied against said cattle in said county, until the plaintiff received a letter about the tenth day of September, 1891, that the said treasurer of said Otero county held a warrant for the collection of the tax so levied as aforesaid, and was about to distrain and sell said cattle for said tax, whereas, in truth and in fact, said cattle were not assessable in said Otero county, and no tax was due or payable therein on said cattle, but that for the reason that the notification aforesaid received by this plaintiff on or about the tenth day of September, as aforesaid, was the first knowledge or notice that such taxes were levied, this plaintiff has been and is wholly

without an opportunity to appear before the board of county commissioners of said Otero county for the purpose of having the said taxes, so assessed against him as aforesaid, corrected and stricken from the tax roll; and that unless restrained by the order of this Honorable Court the said cattle will be sold for the said taxes.

That plaintiff returned to the assessor of Elbert county all of his said cattle for the purpose of being taxed in said Elbert county for the year 1890, and that all of said cattle, including all cattle so claimed to be taxable in Otero county as aforesaid were regularly assessed in said Elbert county for said year 1890, and the treasurer of said Elbert county now holds a warrant for the collection of said tax against this plaintiff.

That unless the said treasurer of Otero county is restrained from selling said cattle for taxes alleged to be due said Otero county for the year 1890 by this honorable court, this plaintiff will be compelled to pay said taxes upon the same cattle twice, and will be compelled to pay taxes upon said cattle to the treasurer of Otero county under a claim and a tax warrant wholly against law."

A demurrer was interposed to the complaint: First—Because the complaint does not state facts sufficient to constitute a cause of action; and, Second—Because the court has no jurisdiction of the subject of the action.

The demurrer was sustained and judgment rendered against plaintiff for costs, to reverse which he prosecutes this writ of error.

We are inclined to the opinion that the question here involved comes clearly within the conclusion reached by the supreme court of this state in the case of *Price et al. v. Kramer et al.*, 4 Colo. 547.

It is provided by the general revenue laws of the state, that all personal property shall be listed in the county where it shall be on the first day of May of the then current year, but if the owner resides out of the state, or fails to return his property to the assessor, it shall be listed and taxed

where it may then be : Provided, that horses, mules, cattle and sheep running at large and not being worked shall in all cases be returned and assessed in the county in which they are being herded or kept on the first day of May in each year. That every assessor shall assess all personal property situate or being in his county on the first day of May in each year. * * *

That it shall be the duty of every person owning or having charge of property in this state subject to taxation to make out and deliver to the assessor on or before the 20th day of May in each year a correct list of the same as required by law.

That if property real or personal shall be omitted * * * the same shall be assessed by the assessor and placed upon his books before the same is returned to the county clerk. * * *

In construing these various provisions of the statute, the supreme court, in the case of *Price et al. v. Kramer et al.*, *supra*, distinctly asserts that it is the duty of the property owner to make return to the assessor of counties showing the number of cattle owned by him running in each of the counties on the first day of May, and that in case he shall fail to do so it is the duty of the assessor to act upon what means of knowledge he possesses, and if injustice be done in assessing for a larger number of cattle than are properly taxable or in assessing them at all, he may present the facts to the commissioners who constitute the board of equalization with power to correct the assessment roll.

The facts presented by the complaint in this case do not strike us as addressing themselves to a court of equity as strongly as the facts detailed in the case above referred to.

It will be observed that by the complaint it is admitted that the complainant knew that his cattle were in the habit of ranging in the county of Otero, and that during the year 1890 and in the month of May of that year he was well aware of the fact that a portion of his herd was ranging within the boundaries of that county. Nor does the complaint show that he had taken any steps towards returning

them to the county of Elbert, or any good reason why such steps were not taken. True it is averred that he had returned to the assessor of Elbert county all of his cattle for the purpose of being taxed; but yet it is admitted that all of the cattle were not in the county at the time they were so returned. He does not allege effort on his part, at any time prior to the first day of May, to ascertain the number of cattle properly assessable in Elbert county or in Otero county, nor does the complaint show what number of cattle were assessed by Otero county, or that he has paid or offered to pay the taxes assessed against him in Elbert county. In other words, it can be said that the complaint is exceedingly indefinite and clearly fails to state facts sufficient to warrant the interference of a court of equity by injunction restraining the collection of taxes.

Under the decisions of the supreme court of this state, stock ranging in the county of Otero on the first day of May was legally assessable by the officers of that county, and because the complainant saw fit to make return of all of his property to the county assessor of Elbert county, it affords no ground for relief against taxation in Otero county.

In the case of *County Commissioners v. Wilson*, 15 Colo. 90, it is held that the first day of May of each and every year is fixed as the date for the assessment of all personal property, and that the liability of property to taxation depends upon its status at that time.

It is true that the complainant may be liable to a double tax against which a court of equity should furnish relief, but even that fact does not sufficiently appear on the face of this complaint, for the reason that there is no allegation in the complaint showing that the county of Elbert would not relieve him, upon proper application, from taxes on cattle which had been properly taxed in the county of Otero, notwithstanding the return made by him.

In the case of *Breeze v. Haley*, 10 Colo. 5, it was held that the board of county commissioners have almost unlimited

power to correct any errors that may occur in any assessment either before or after the payment of taxes thereon.

It would be useless to cite authorities outside of our own supreme court in support of the conclusion here reached. They are binding upon us, and support us in saying that the injunction proceedings sought by complainant in this case cannot be maintained.

The judgment must be affirmed.

Affirmed.

DAVIS, APPELLANT, v. THE JOHN MOUAT LUMBER COM-
PANY, APPELLEE.

1. MECHANICS' LIEN—PARTIES.

In an action to foreclose a lien by a material man or subcontractor, the contractor or original promisor, against whom a debt must be established as the foundation of a decree, is an indispensable party.

2. SUMMONS, PUBLICATION OF.

It is necessary that every material requirement of the statute concerning service of summons by publication be carefully and strictly pursued in order to give the court jurisdiction.

3. PERSONAL JUDGMENT—JURISDICTION.

A personal judgment in an action upon a money demand against a non-resident, on whom personal service of process within the state has not been had and who did not appear, is without validity.

4. ACTION, NATURE OF.

An action to foreclose a mechanics' lien is not, as to its principal basis, a proceeding *in rem*.

Appeal from the District Court of Arapahoe County.

ON the first day of June, 1890, Henry W. Davis, the owner of some property in Waddell and Machen's Sub-division, made a contract with one L. E. Forbes to build a house on his land. Beyond the general provisions relating to the details of the structure the contract provided that

2	381
3	983
2	381
4	166
4	946
4	485
4	512
2	381
7	96
21c	95

Forbes should take in payment two lots at a specified valuation and subject to certain incumbrances, and that the balance of the contract price, fifteen hundred dollars (\$1,500), should be paid in cash; eight hundred dollars (\$800) was to be paid when the house was under roof, and the balance when the house was completed. The contractor went to work to carry out the contract, and during the progress of the work bought some materials of "The John Mouat Lumber Company," one of the parties to the suit. The contractor seems to have had considerable dealings with the lumber company, and to have bought quite a quantity of materials which he was using in the carrying out of his various undertakings. In the suit which the lumber company brought against Davis as the owner, Forbes as the contractor, and divers other persons as lienors, they claimed that Forbes had bought of them materials of the reasonable value of four hundred and eight dollars and sixty-five cents (\$408.65) which went into the construction of the house. Within the time limited by the statute during which a lien might be filed by subcontractor, the company filed its claim in the proper office, and in the form necessary to the protection of their rights. The only matter of importance in dispute concerning the lienor's rights, which grows out of the facts necessary to entitle the company to file the claim, springs from the evidence offered to show that the materials went into the building. It is claimed that the company failed to prove that the materials went into the building. The delivery on the ground was not satisfactorily established, nor was it clearly shown by witnesses who had knowledge of the affair that the stuff sold went into the building.

The suit was commenced by the service of a summons on the owner and other lienors, and the plaintiff attempted to secure service on the principal contractor Forbes by a substituted service under the statute. The case seems to show that Forbes had left the country, and the Lumber Company was unable to get service on him, and in order to prosecute the suit as against him obtained an order to publish the sum-

mons. This order was based on an affidavit made by William E. White, and substantially set forth that he was one of the attorneys for the plaintiff in the action, and that Forbes had departed from the state *sine animo revertendi*, and that his post-office address was not known to the affiant; the affidavit discloses no interest on the part of White in the suit other than that springing from his relation to it as an attorney. The order was obtained, publication had, and on the trial personal judgment was rendered against Forbes for the sum claimed to be due. The right to obtain the judgment on this service and the necessity of a judgment against Forbes to entitle the lienor to enforce his claim are questions abundantly saved by the record.

The statute to which the company must resort to ascertain its rights and from which must be derived the means and process of enforcement was passed in March, 1883. It has been amended, but the only provisions to which reference will be made for the purposes of this decision are :

“Section 25. The court may proceed to hear and determine said liens and claims, or may refer the same to a referee to ascertain and report upon said liens and claims, and the amounts justly due thereon. Judgment shall be rendered according to the rights of the parties. The various rights of all the lien claimants, and other parties in any such action, shall be determined and incorporated in one judgment or decree. Each party who shall establish his claim under this act shall have a judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien shall have attached to the extent hereinbefore stated.” This section it will be observed relates to the proceedings prior to judgment and the parties who must be before the court when the decree is rendered.

The other two sections which bear upon the questions before the court are first, section 1, as amended in the Session Laws of 1889, page 247, which is as follows :

“Section 1. Whoever shall do any work or furnish any material by contract, express or implied, with the owner of any land, his agent or trustee, for the construction, enlargement, etc., of any building upon such land,” etc. The balance of the section need not be stated.

The other section as amended by the last named act is section 15 of the original statute, and 7 of the amendatory act, and is as follows: “In case such lien is claimed by a subcontractor, or assignee of a subcontractor, it shall attach and extend to the full amount due the contractor as provided by the original contract, and by any subsequent contracts relating to the same structure or improvement; and any payments made by the owner to the contractor, either before or after making such contract, or during the erection of such building or the making of such improvements, and during the time provided to subcontractors in which to file their liens, shall be at the risk of the owner; and no such payment shall be set off against the claim of any subcontractor, or assignee of a subcontractor who shall file his statement for lien and serve a copy thereof, as herein provided.” The only other provision of the statute bearing upon the subject matter of this section 7 is the ensuing one which generally provides that the owner shall only be responsible to the extent of his contract price for the work.

It is substantially provided by section 4 of the amendatory act that the lien claimed be filed any time after the work is done, regardless of the limit of 60 and 40 days generally expressed in the statute as the period during which liens must be filed by the contractor or subcontractor respectively, providing the rights of purchasers and incumbrancers in good faith remain unaffected, and in the case of subcontractors, providing further that the principal contractor may not have been settled with by the owner.

The act of 1883 contained a section giving to the subcontractor the right to protect himself as to materials to be furnished or work to be done upon a contract by serving a notice of his intention which, by its terms, should substantial-

ly notify the owner of what his probable future claim might be. This provision however was swept away by the amendatory act of 1889, and there is no provision made in the statute for a notice to the owner of the making of the contract by a subcontractor, or his intention in the premises.

On this case judgment was entered against Forbes, the contractor, for the sum claimed to be due with costs, and against the owner Davis a decree was entered declaring the claim of the Lumber Company a lien upon his property, foreclosing it, and ordering the land and structure to be sold in satisfaction. By appeal the case was brought here.

Messrs. NORRIS & HOWARD, for appellant.

Mr. WILLIAM E. WHITE and Messrs. C. E. & F. HERRINGTON, for appellee.

BISSELL, J., after stating the case, delivered the opinion of the court.

Notwithstanding the fact that lien laws have long been in force in the state, and are a part of its recognized legislative policy, the present controversy raises several questions which thus far in this jurisdiction remain undetermined.

The initial question naturally presented in the order of events concerns the parties to the suit and the method by which they have been brought into court. Our statute lacks the definite direction which some enactments contain that all persons in interest, including owners, contractors and lienors, shall be made parties. But the essential character of the suit, the indebtedness upon which the right to a lien rests, and the general provision concerning the entry of judgment, as clearly as the definite direction of the other acts, require the presence of the contractor in a suit by the material man to recover for that which he has furnished. However true it may be that the principal purpose of that suit is to enforce the lien against the property and thereby recover

the debt due from the contractor, it is as equally certain that that debt is the foundation of the action, and unless it exists, and is then enforceable, the incidental right to enforce the lien cannot prevail. Many of the cases which have passed upon the question, put their decisions upon the ground that the inquiry necessarily involves the contract relations and state of accounts existing between the contractor and the one seeking to enforce the lien; that without the establishment of that debt there can be no right of recovery by the subcontractor, and his right to a lien is dependent upon the establishment of his claim or debt against the contractor. With this, say the authorities, the owner has nothing to do, and the burden of establishing that claim is put by the law upon him who brings the suit and seeks the relief. On this broad general basis, regardless of the statute, it has been often held that the contractor was an indispensable party to the action. With this view we agree, and adjudge that the contractor is not only a proper, but a necessary and indispensable party, against whom a debt must be established as the foundation of the decree for the foreclosure of the lien. *Vreeland v. Ellsworth et al.*, 71 Ia. 347; *Kerns et al. v. Flynn*, 51 Mich. 573; *Steinkamper v. McMannus et al.*, 26 Mo. App. 51; *Sinickson v. Lynch*, 25 N. J. L. 317.

While the statute does not directly require that the contractor shall be a party to the suit, it undoubtedly provides for a judgment in his favor against the party personally liable for the claim, to be followed by a decree in his favor against the property to the betterment of which his material has gone. It was within the evident contemplation of the legislature that the original promisor should be a party to the suit, and that a judgment against him should precede a decree against the owner, who would probably be entitled to compel the collection of the personal judgment if he could show assets belonging to the contractor before the one holding the derivative right, and proceeding *in invitum* could take his land in payment of the debt. At all events the reasons for the presence of the original debtor are so con-

clusive that in the absence of any statute it should be adjudged necessary to bring that debtor before the court prior to the entry of any decree against the owner of the land.

Since the contractor was an indispensable and necessary party, it becomes needful to ascertain whether he was in court and whether the judgment against him was properly entered. There are two fatal objections to the recovery. The first is that the order for the publication of the summons was improperly entered. No such affidavit was filed as is required by section 41 of the Code of 1887 under which the suit was commenced. The affidavit was made by an attorney in the suit, and not by the plaintiff or one of the plaintiffs, or any such representative of the corporation as is entitled under the law to act on its behalf. The necessity to strictly follow the statute in these cases has long been established, and it has been repeatedly adjudged by our supreme court that every material requirement of the statute concerning the publication of summons must be carefully and strictly pursued, in order to give the court jurisdiction: *O'Rear v. Lazarus*, 8 Colo. 608.

While perhaps not so strictly put in, *Morton v. Morton*, 16 Colo. 358, as it is in this decision, the court undoubtedly held that the attorney was without capacity to make the requisite affidavit, unless some further or other showing was made than the present record discloses. It is difficult for this court to see how, except in a very extraordinary and exceptional instance, an attorney can make himself competent, by reason of his interest, to make the requisite proof upon which the order can be based. The statute distinctly specifies that the affidavit shall be made by a party to the action, and whether, even though possessed of an interest, if not a technical party, he could still make the proof, would be a matter of very serious question.

It therefore follows that the contractor was a necessary party and that no service was made upon him. It is equally true that the preliminary judgment could not be rendered against him, since it was of the nature personal. Ever since

the very able and elaborate opinion in *Pennoyer v. Neff*, 95 U. S. 714, was rendered by the supreme court of the United States, it has been pretty universally conceded by the profession that a personal judgment rendered by a state court, in an action upon a money demand against a nonresident, on whom no personal service of process within the state was made, and who did not appear, is without any validity. Prior to this adjudication there was some diversity among the state courts on this subject, but it is doubtful if hereafter any well considered case will lay down a different doctrine. The opinion was so ably fortified by authority, and by reason, and rested upon such solid and immutable foundations, that it must be accepted as expressive of the right doctrine in these cases. There is an exception recognized by the supreme court and provided for in our own statute, which always rests on the fact that a *res* is seized by the process of the court. When this is true, then to the extent of the seizure, and the adjudged limit of the title of the nonresident, that thing may be subjected to any judgment which a court of competent jurisdiction sees fit to render against the nonresident. But the exception must clearly exist, to take the case without the limit and operation of the rule, and it is plain that the only interest or right of the nonresident which can be affected by the adjudication is that which he may possess in the *res* itself. Whether he have the absolute title, or only a contingent and derivative interest, is of little consequence, since it is only his interest in the property which is affected by the adjudication. The present case plainly does not come within the exception. In the first place it is not, as to the principal basis of the action, a proceeding *in rem*. It is an action against the contractor to recover the debt due for material sold him under a contract to which the owner was not a party. The incidental right to enforce and foreclose the lien claim against the owner in that action cannot be confounded with the principal object of the suit, which is, to recover the debt due from the contractor to the person from whom he bought his supplies; and while under our liberal practice it is

permitted to join those parties, and to seek the enforcement of these rights concurrently in one action, it must readily be recognized as true that under the strict and more accurate procedure of the common law, the judgment against the contractor must have been entered in a suit to which the owner could not have been made a party, and that that judgment, coupled with the lien, would have furnished the substance of a bill for the foreclosure of the security. The union of the two remedies in one action must not be permitted to obscure the fact that the establishment of the debt, and its recovery, is necessarily a condition precedent to the enforcement of the other remedy, which must be held the collateral, and not the principal, object of the action. On this basis the publication could in no event be had, since the right to publish a summons in all personal actions is expressly excluded in the statute granting authority to publish summons in certain cases. It is thus evident that if the publication had been upon a sufficient and ample affidavit it would not have authorized the rendition of judgment against the contractor, and there would have been no basis for the decree foreclosing the lien.

Counsel have very elaborately argued that the sections of the statute quoted in the statement relating to payments by the owner to the contractor under his agreement with him were clearly unconstitutional, and an infraction of the rights of the citizen to deal with his property at his pleasure. It has been very ably and earnestly contended that since under the statute of Colorado the right to a lien is dependent on the existence of a contract, the subcontractor can rightfully be held to be subject to its provision, and that he can acquire no other or greater rights than flow to him therefrom, and that, regardless of the statute, it must be adjudged that his rights are to be taken as limited and controlled by the terms of the agreement between the original parties. There is great force in these suggestions. But the question is one of unusual gravity, and involves the discussion of a constitutional question over which the statute creating this court has de-

prived us of the power of final determination. Under these circumstances, since the case may well be rested on the ground antecedently stated, we may readily be excused from discussing or determining the question. If it were essential to the settlement or ascertainment of the rights of the parties the court would decide it, even though its judgment would be subject to a reconsideration in another tribunal. It is not essential, and it will neither be discussed nor decided.

For the reasons already assigned, and for the error which the court committed in entering judgment against the contractor, the case must be reversed and remanded.

Reversed.

LEPPEL, APPELLANT, v. BECK, APPELLEE.

1. AFFIDAVIT IN ATTACHMENT—DEFECTIVE.

An affidavit in attachment which fails to state definitely the nature of the demand, is defective, but not so defective as to render the proceedings thereunder absolutely void because of the provision of the code permitting the amendment thereof.

2. SAME—COLLATERAL ATTACK.

The sufficiency of the affidavit cannot be attacked collaterally by a third party.

Appeal from the District Court of Garfield County.

Mr. M. J. BARTLEY, for appellant.

Mr. C. W. DARROW, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

On June 22, 1891, in the county court of Garfield county, the appellee herein, Chris. Beck, commenced an action against one Joshua T. Boyd, in which action a writ of attachment issued directed to the sheriff of Garfield county.

The affidavit in attachment, after giving the caption and title of the case, is in words and figures as follows :

“ Chris. Beck, of the said county, being duly sworn, doth depose and say that Joshua T. Boyd, against whom the said Chris. Beck is about to sue out an attachment, is justly indebted to him in a sum of money not exceeding twenty hundred dollars, to-wit, the sum of fourteen hundred eighty-one and fifty-two one-hundredths dollars, and that said demand is wholly due and unpaid, and that said demand is upon overdue book accounts and upon contracts for the direct payment of money.”

Under the attachment writ the sheriff levied upon a stock of groceries, dry goods, liquors and other personal property. Subsequently an order of the county court upon proper showing was made, directing the property attached to be sold, which was done, and the sum of \$1,605 was realized, and this sum now remains in the hands of the sheriff awaiting the termination of this appeal.

On the 11th of July, 1891, appellant recovered a judgment against Joshua T. Boyd for the sum of \$1,422.92, upon which judgment a writ of execution was issued, and was delivered to the sheriff on July 18, 1891, and remained in his hands at the time of the intervention proceedings hereinafter mentioned.

In July, 1891, in the attachment proceedings of Beck v. Boyd, appellant filed his petition of intervention by claiming that the writ of attachment in that action was issued without authority of law, because the affidavit upon which the writ of attachment was founded wholly failed to state the nature of the indebtedness claimed to be due from defendant to plaintiff; and sought to have the moneys in the hands of the sheriff applied in satisfaction of the judgment in his favor.

To this petition a general demurrer was filed. The county court sustained the demurrer and plaintiff elected to stand by his petition, and appealed to the district court of that county, where the demurrer to the petition was also sus-

tained. Judgment was entered and an appeal brought to this court.

The questions for our consideration are: First: Was the affidavit in attachment sufficient to authorize the issuance of a writ of attachment. Second: Can a subsequent creditor attack the sufficiency of an affidavit by petition of intervention.

The code provides that no writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought an affidavit, setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment * * *. That the action is brought upon an overdue promissory note, bill of exchange, or other written instrument for the direct and unconditional payment of money only, or upon an overdue book account. Sec. 92, Acts 1887, 121-123.

Section 117 of the Code provides that, "No writ of attachment shall be quashed nor any garnishee discharged, nor any undertaking given by any person or persons under proceedings by attachment be rendered invalid, nor any rule entered against a sheriff, discharged on account of any informality or insufficiency of the original affidavit, or of the original undertaking given for the attachment, if the plaintiff or the plaintiffs, or some credible person, or his agent, or attorney for him or them, shall file a sufficient affidavit in the cause. * * * And if on the trial of the issue formed by the traversing of the allegations in the affidavits for attachment, it shall appear that the evidence introduced by the plaintiff does not tend to prove the cause or causes of attachment alleged in the affidavit, but the evidence does tend to prove other cause of attachment in this act, then the plaintiff may on motion, showing good cause therefor, be allowed to amend his affidavit to correspond to the proof, the same as pleadings by this act are allowed to be amended in cases of variance."

It will be observed that the affidavit does not strictly com-

ply with the provisions of the code above recited in this: That it does not definitely state the nature of the demand. It does however state the amount of the demand and that the same is based upon overdue book accounts and upon contracts for the direct payment of money. But it fails to state what portion of the entire sum due is based upon book accounts and what portion upon contracts for the payment of money. In this respect we think that the affidavit is defective, but we are not prepared to admit that it is so defective as to render the proceedings thereunder absolutely void because of the subsequent provision of the code in providing that the writ shall not be quashed for any informality or insufficiency of the original affidavit. And the further provision that the affidavit may be amended, for good cause shown, to correspond with the proof.

The affidavit in this suit was not attacked by the defendant in the attachment proceedings, nor does the record disclose that he contemplated interposing any defense whatever to the proceedings. This therefore brings us to the consideration of the question: Can the affidavit be attacked by a third party in a collateral proceeding?

This question has received the consideration of this court in the case of *Elliott v. The First National Bank of Colorado Springs*, ante, p. 164, wherein it is determined that questions of the nature here presented must be raised between the parties to the suit, that they cannot be raised collaterally by a third party. To admit a contrary view would be, in our judgment, announcing a principle that would render absolutely useless the provisions of the code embraced in section 117. It would allow a third party to accomplish by an indirect proceeding what in effect the defendant in the original attachment proceedings could not accomplish. It cannot be denied that had the defendant in the attachment proceedings interposed a motion to dissolve the attachment on the ground of the informality or insufficiency of the affidavit, it would have been the duty of the court granting such

motion to permit the plaintiff to amend his affidavit to conform to the requirements of the practice act.

If however we should hold that this proceeding could obtain, and the money in the hands of the sheriff be subject to the creditor's execution, that would be depriving the plaintiff of a privilege which the statute directly confers upon him. We think that the language of the statute is sufficient of itself to show that the affidavit nor the bond could be attacked collaterally by a third party.

In *Dixey v. Pollock*, 8 Cal. 570, it was determined that, "In a contest between the attaching creditors, all the equities are in favor of the most diligent, and that an irregularity cannot be taken advantage of by a stranger, to the action in which it occurs." That, "The subsequent execution or attachment creditor can claim no equitable relief. If the proceedings of the prior creditor are not void, but voidable, the defendant alone can object.

Scrivener v. Dietz, 68 Cal. 1, was a case somewhat similar to the one in hand, and the court, after determining that there was an irregularity in the affidavit said, "Admittedly this irregularity in the affidavit constituted good ground for a motion by the attachment debtor to dissolve the attachment; and if such a motion had been made by him to the court in which the action was pending, it would have been the duty of the court to have dissolved the attachment. But neither the regularity of the affidavit, nor the validity of the attachment issued upon it, was questioned by the debtor; he therefore waived whatever irregularities existed in either, and as against him at least the attachment was valid and operative. So that its execution, if according to law, operated to create a provisional lien upon the property on which it was levied in favor of the attaching creditors; and as this lien, upon the recovery of a judgment in the action is *transit in rem judicatam*, and is merged in the judgment, the attachment proceedings are not attackable collaterally for an infirmity in the affidavit. Notwithstanding the infirmity, the attachment was not void; it was only voidable at the

instance of the attachment defendant, and could not be assailed collaterally by a stranger. *Harvey v. Foster*, 64 Cal. 296; *Porter v. Pico*, 55 Cal. 165.

In *Pace et al. v. Lee & Co.*, 49 Ala. 571, it is said that, "When a claim is interposed under the statute to property taken under attachment, the claimant cannot, on trial of the claim suit, take advantage of any more errors or irregularities in the proceedings against the defendant in attachment."

In *Morisi v. Swift*, 15 Nev. 215, it was held that, "An objection to the validity of an attachment upon the ground that the affidavit and undertaking was defective, cannot be raised by a third party in a collateral proceeding."

Appellant insists that the California authorities are not in point, because he has been unable to find in the code of that state a provision allowing intervention in attachment proceedings.

Upon investigation we find that this position is not well taken, as the supreme court of that state have repeatedly determined that such proceedings were proper and warranted under the practice act of that state. *Davis v. Eppinger*, 18 Cal. 379, and cases cited; *Coghill & Co. v. Marks et al.*, 29 Cal. 678.

Besides, under our statute allowing the affidavit to be amended in case it is attacked by the debtor, the contention is untenable.

The judgment must be affirmed.

Affirmed.

THE DENVER & RIO GRANDE RAILWAY COMPANY, PLAINTIFF IN ERROR, v. OUTCALT, DEFENDANT IN ERROR.

1. CONSTITUTIONAL LAW.

Section 3712, Mills' An. Stats., fixing upon railroad companies an absolute liability for damages for all stock injured or killed, and sec. 3713, which provides for a recovery of double the appraised

2	395
2	443
3	400
18c	614
2	395
4	150
4	427
2	395
6	65
7	286
22c	231
2	395
12	3

value of the animals injured or killed, with a reasonable attorney's fee in case of failure to pay the appraised value within the time prescribed, are unconstitutional and void.

2. CONSTRUCTION.

A statute may be declared unconstitutional in part and valid in part, but this can occur only when its provisions can be separated and made independent. When its provisions are interdependent, the entire statute must stand or fall.

Error to the County Court of Gunnison County.

THIS was a statutory action brought against the railway company to recover the price or value of a mare killed by an engine. There is no serious conflict of testimony. The facts as established are, that plaintiff below (defendant in error) had several horses running in a pasture on his farm,—the railway of plaintiff passed through the pasture; that defendant, for his own convenience in catching or handling the horses, turned four or more out with ropes or lariats on, twenty or twenty-five feet long, one end being around the neck of the animal, balance loose and dragging; the mare killed was one of those encumbered with a rope. The horses on the approach of the engine were in the immediate vicinity of the track; the train was "slowed up" and whistle blown; the horses crossed the track and were supposed to be entirely out of danger, but immediately after it was seen by the engineer and fireman that the mare in question was fastened to the track by the rope being caught in the track, the end caught or fastened being on the opposite side from the mare, the rope consequently passing across the track was caught by the engine; the air brakes were at once applied but it was impossible to stop in time; the mare was pulled upon the track by the rope, struck by the engine and killed, or injured so as to make killing necessary. An appraisement was had and the mare valued at \$200. The company failed to pay within thirty days; suit was subsequently brought, a trial had, resulting in a judgment for the plaintiff for \$400, double the appraised value, also for \$50 attorney's fee, making the amount \$450 and costs.

Messrs. WOLCOTT & VAILE, for plaintiff in error.

Messrs. GULLETT & CRUMP, for defendant in error.

REED, J., after stating the facts, delivered the opinion of the court.

The provisions of the statute under which the action was brought, and which are necessary to be considered in determining the case, are the following :—

2 Mills' Stat., p. 1979, § 3712.—“ That every railroad or railway corporation or company operating any line of railroad or railway or any branch thereof, within the limits of this state, which shall damage or kill any horse, mare, gelding, filly, jack, jenny or mule, or any cow, heifer, bull, ox, steer or calf, or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof.”

And § 3713, p. 1980–81.—“ And such railroad or corporation shall within thirty days after the receipt of such certificate, pay to the owner of the stock so killed or damaged, or to his or her authorized agent, the amount of such appraisement, together with all the costs, as aforesaid; and in all cases where the value of such stock is established by this act, such company or corporation shall pay for such stock within thirty days after the delivery of the affidavit and certificate of ownership of brand, or affidavit of ownership of said stock, and if any such company shall so fail to pay for such stock within thirty days after the delivery of such affidavit and certificate, such company shall be liable for double the value the appraised or schedule value of any such animal or animals, together with reasonable attorney's fees, to be allowed by the court.”

The only question presented and urged in argument is the supposed unconstitutionality of the statute in question. It is ably contended, first, that defendant is absolutely fore-

closed, precluded from all defense, having no day in court; second, that the statute is penal in character, in doubling the amount of appraised valuation and adding an attorney's fee for a failure to pay within the thirty days limited and prescribed. The questions presented are delicate and troublesome. Were the questions between individuals, the solution would be far easier. Railroad corporations having no natural rights but their existence, and all rights being franchise rights granted by the state, to what extent they can be subjected to class legislation and taken out of the domain of general laws and principles applicable to individuals is a serious and intricate question. The granting by the state of a franchise to operate a railroad, and its acceptance by the corporation is regarded in the light of a contract, and where the legislation preceded the act of incorporation, such laws are supposed to be contemplated and accepted by the party accepting the charter and to form a part of the contract, but when the restrictive and arbitrary legislation is subsequent to the grant and acceptance, the question is, how far a corporation can be subjected to class legislation, to law made applicable only to it.

After careful and exhaustive examination of the authorities I am reluctantly compelled to hold the statute in question, as construed and administered in our courts, unconstitutional and void. I am the more reluctant, from the fact that although its constitutionality has not been directly decided by the supreme court, as far as I can ascertain, there are cases that may be construed as sustaining the statute. In *Denver & Rio Grande Railway Co. v. Henderson*, 10 Colo. 1, it is said: "Upon a full and careful compliance by the owner of the animal injured with the requirements of the act, he would seem to be entitled thereunder to the compensation fixed or proven as the case may be, regardless of the question of negligence on the part of the defendant company. Failing to comply with the statute, however, such owner may still have his common law action."

It will readily be seen that the question of the validity

of the statute was neither raised nor determined. The court held the statute not the exclusive remedy, but cumulative; that the party could make his election, and having made it in favor of the common law action, he was required to make proof of negligence. In other words, that he could not recover without complying with the requirements of the common law, regardless of the statute. In the paragraph cited the learned judge was very guarded in discussing the statute—says: "*He would seem to be entitled,*" etc. It is only discussed in so far as was necessary to distinguish between the amount and character of proof required to make a case.

In *Union Pac. R. v. DeBusk*, 12 Colo., 294, in a very elaborate opinion, the statute making railroad corporations liable for damages caused by fire is declared constitutional, but the decision cannot in any way be construed to cover the statute in question. There are in this important provisions, viz., in regard to double compensation and an attorney's fee not contained in that; again, science and practical experience may have clearly demonstrated that, with proper mechanical appliances and care, fire would not be communicated. If such is the fact the statute only requires such protection to the property of others as public policy and common prudence would dictate; and the absolute liability for the actual damage may be regarded as a proper penalty for a failure, either to provide proper appliances, or exercise proper care. It is only upon this theory that the statute can be sustained.

Although the discussion in the opinion takes a wide range, the conclusion must be held applicable only to the statute involved in the case; it cannot be presumed that it was the intention of the court to anticipate and decide in advance questions that might arise in regard to another statute, on a subject hardly analogous, and containing other and different provisions.

One criticism upon the opinion may be allowed. From the discussion and language used, it seems impossible to determine whether the statute in question in that case was regarded as absolute in character, fixing the liability for the

damage on proof that the fire was communicated by the engine, or whether that fact was to be regarded only as *prima facie* evidence of negligence that might be rebutted by evidence for the defense. In either statute, the validity greatly depends upon the construction of the statute and the solution of that question.

The statute under consideration in this case, as construed and applied, violates art. XIV (14th amendment of the constitution of the United States), which says: * * * "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is also in violation of sec. 25, Bill of Rights of this state, which declares, "that no person shall be deprived of life, liberty or property without due process of law." Though differing slightly in wording, the same declaration or provision occurs in the constitutions of all the states, a principle asserted in *Magna Charta*, which was embodied in, and became a fundamental principle of the common law, asserting the inviolability of the equality of all persons before the law, and prohibiting class or discriminating legislation.

In England, the authority of parliament is subject to the limitation that no law shall be passed which is contrary to common right and natural justice. In the old case of *Dr. Burham*, 8 Coke, 1183, Lord Coke said: "It appears in our books that in many cases the common law will control acts of parliament and adjudge them to be utterly void; for, when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." And see *Day v. Savadge*, Hobart, 85.

"Due process of law" has been frequently and variously defined, the result reached in each instance being the same. The briefest and most comprehensive definition is that of Johnson, J., in *Bank of Columbia v. Okely*, 4 Wheat. 244: "They were intended to secure an individual from the arbitrary exercise of the powers of government, unrestrained by

the established principles of private rights and distributive justice." Judge Story (Story Const., § 1935) defines it as follows: "The right to be protected in life and liberty and in the acquisition of property *under equal and impartial laws which govern the whole community*. This puts the state upon its true foundation, a society for the establishment and administration of general justice, justice to all, equal and fixed, recognizing individual rights and not impairing them." In Cooley on Const. Limit. § 356, it is said: "Due process of law, in each particular case, means such an exertion of the government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribed for the classes of cases to which the one in question belongs."

Mr. Webster, in *Dartmouth College v. Woodward*, 4 Wheat. 519, said: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, his liberties, his immunities under the general rules which govern society."

In *Hurtado v. California*, 110 U. S. 536, Mr. Justice Matthews said, while recognizing the inherent and reserved powers of the state to make their own laws and alter them at pleasure, "that these reserved powers must be exerted within the limits of the fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions." The same principle is recognized and ably asserted by Beck, C. J., in *In re Lowrie*, 8 Colo. 499. "Properly construed these maxims interpose no barriers in the way of wholesome legislation of any kind, but they prevent special and class legislation, and all forms of legislation the effect of which is to extend privileges and securities to a portion of the community which are withheld from another portion, although relating to the same class of subjects. So far as the laws are conformable to the constitutional provision guaranteeing equal and impartial security and the protection of the

rights of the whole community, they become the law of the land, and the adjudication of individual rights thereunder is by due process of law. The same principles are applicable whether we refer to the enactment of laws by general assemblies or to their judicial interpretation. They must be so framed and so administered as to come within the constitutional landmarks, abridging the immunities and privileges of no person, but affording equal protection to all."

However it may be in England, it is clear that the constitutions of this and other states confer no power upon the legislature to enact laws in conflict with the principles of natural justice and equity of the common law, upon which those constitutions were founded, and which for centuries have been regarded as fundamental. The general grant of power to make "reasonable and wholesome laws" is limited; it confers no power to enact a law in violation of the fundamental principles of the common law as they existed at the time the constitutions were adopted.

In *East Kingston v. Towle*, 48 N. H. 61, it is said:—"Either way, whether these elementary principles of justice and equity are supposed to be embraced in the term of 'the law of the land,' or implied in the general nature of legislative authority, they equally limit the legislative power. It is a maxim of general jurisprudence, not confined to any code, but, so far as I am informed, recognized as fundamental in the law of every enlightened people, that no man's private rights shall be concluded by any judgment, decree or adjudication, to which he was not so far a party that he had opportunity to be heard and to adduce evidence on all points that affected his interests." See also Broom's Leg. Max. 735; 1 Greenlf. Ev. § 522; *Parsons v. Russell*, 11 Mich. 113; *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Green v. Briggs*, 1 Curtis C. C. Rep. 311.

The business of operating railroads is legal and legitimate. The right is granted by the state and secured by charter. The public benefit of railroads is recognized; they are of inestimable value as agents in the settlement of the country,

the development of its resources and in its civilization, but they are agents of dangerous power. Their operation, under all circumstances, and handled with the greatest care, being dangerous to life and property, hence the necessity of precautionary measures and legislation requiring great care and the best mechanical appliances and skill. Such legislative and precautionary measures are the proper and the legitimate exercise of the police power of the state, but laws of that kind must define the duties and requirements, may require the fencing of roads, putting in cattle guards, prescribe a requisite amount of skill in operatives, and perfection in machinery and appliances, making such laws penal, and fixing a penalty for violation, but the statute under consideration is not of that character. It is the bald declaration "Thou shalt not kill," nor injure—declares that railroad corporations shall be liable for all damages to stock caused by their trains, without regard to the skill and care with which the train is operated, precluding all defense, even as in this case, of the gross negligence of the owner of the stock. The statute is absolute, conclusive of the liability upon proof of the injury and damage only.

There is no question of the power of the legislature to repeal laws of evidence, enact new and different laws, or to change or modify existing laws. It is regarded as valid and legitimate legislation within fixed limits. If the statute made the killing or injury of the stock *prima facie* evidence of mismanagement or neglect, and changed the common law burden of proof, and required the corporation to exonerate itself by competent evidence, the statute could stand, but precluding all defense and making the liability absolute, it clearly violates a fundamental principle of the constitution, and is repugnant to the principles and maxims of the common law upon which the constitution was based. It declares that the corporation shall be liable, and make payment, for damages inflicted by inevitable accident, which no care, skill, diligence or foresight could prevent, and precludes the corporation from exculpating itself or making any defense what-

ever. In this it is discriminating, special and void. Natural persons are allowed to defend and exonerate themselves, show that the misfortune was inevitable, and the accident and damage unavoidable. Any statute that forecloses a defendant and precludes all defense and denies the "day in court" is, and must be unconstitutional and void. Under the statute in question, as construed and applied in this case, the only participation in the proceedings allowed the defendant corporation is the right to participate in the appraisal of the value or damage.

Such is the absolute character of the statute and such its construction and application by the courts, that not only is the corporation prevented from showing its own care and diligence, and the unavoidable character of the accident, but it is also precluded from showing the contributory negligence, or even design, of a plaintiff in causing the injury. If the statute is to be regarded as so absolute and conclusive in character as to preclude all proof of negligence on the part of the plaintiff, it would also preclude proof of wanton and intentional acts in subjecting his animals to injury or destruction. Under the wording of the statute, making the liability absolute on proof only that the damage was done by the defendant, to allow proof of the negligence or willful acts of the defendant contributing to or causing it would be not an application of the statute, but a departure from it, there being no exceptions or provisions in it limiting its liability or exonerating it.

It is contended on the part of the defendant in error that similar statutes in several of the states have been held to be constitutional. I think this a mistake; in almost every instance, if not in all the cases, it will be found that the statute in question was the legitimate exercise by the legislature of the police power of the state, and that the liability was only made absolute as a penalty for a failure to comply with the requirements of the law, a failure to fence the road, to put in cattle guards, to blow whistles, ring the bell, reduce the speed to the required minimum, to employ competent

operatives or provide the best and most proper mechanical appliances. Under such circumstances the law is penal in character, and the absolute liability, the penalty and the law can be sustained as a police regulation, but there is a marked distinction between a law of that character and the one under consideration. Here there is no violation of a law, or pretense of a failure to comply, by the corporation. I think that in almost every instance a statute making the liability absolute and not a penalty for a violation of law, has been held unconstitutional.

In addition to the authorities cited, see, *Zeigler v. Ala. R. R. Co.*, 58 Ala. 594; *Stoudenmire v. Brown*, 48 Ala. 699; *Oliver v. Robinson*, 59 Ala. 46; *Kingston v. Towle*, 48 N. H. 57; *Piscataqua Bridge v. Portsmouth Bridge*, 7 N. H. 85; *Littleton v. Richardson*, 34 N. H. 179; *Opinions of Judges*, 41 N. H. 551; *Hurtardo v. California*, 110 U. S. 586; *Sullivan v. Oneida City*, 61 Ill. 242; *Millett v. People*, 117 Ill. 298; *Fetter v. Wilt*, 46 Pa. St. 460; *Board etc. v. Bakewell*, 122 Ill. 340; *Craig v. Kline*, 65 Pa. St. 413; *Cairo & Fulton R. R. v. Parks*, 32 Ark. 131; *Ohio & Miss. R. R. Co. v. Lackey*, 78 Ill. 55; *Jensen v. U. P. Railway*, 21 Pac. Rep. 994; *Billenburg v. Mont. N. R. Co.*, 8 Mont. 271.

The statute in question gives to the plaintiff double the appraised value of the animals killed or injured upon failure to pay within thirty days after appraisement. The same can be said of this provision as of the former. It can only be sustained as the penalty for the violation of an affirmative penal statute. As such it could be sustained as punitive damage for the failure to comply with the statute, not otherwise. An attempt to enforce it in a case like the present, where it is not contended that there has been any violation of a statute, renders it unconstitutional and void. When so applied it is repugnant to natural justice and equity, and opposed to the principles and maxims of the common law. Conceding the corporation liable for the damages inflicted, regardless of the circumstances, what is the measure of damage? According to the fundamental and long established principles

of equity and justice, the answer is obvious—adequate compensation for the injury received, the value of the animal as appraised, and if payment is refused or the money withheld for an unreasonable time, interest upon the amount. The unreasonable withholding of money is compensated in damages in the way of interest, generally fixed by statute; when that is not the case, the value of the use of the money for the time it is detained.

When double the amount of actual damage is arbitrarily given to the owner for thirty days detention, it can only be sustained, as before stated, as punitive damage; a penalty for the violation of a law presupposes criminal intention, or moral obliquity, a willful and malicious killing, wanton injury, and double value is awarded as punishment. When such facts are not established by evidence, or required to be, there can only be compensatory damage; anything further is repugnant to the constitution and the well-settled maxims of the common law, and, as in this case, allows the injured party twice the value of the property destroyed, not by any willful and malicious act, contravening a law, but by an inevitable accident, an injury, for which the plaintiff was responsible, or to which he contributed by culpable negligence.

It is further contended that the statute in question is unconstitutional in allowing the plaintiff in such actions an attorney's fee. In this case, in addition to the double appraised value, judgment was entered for an attorney's fee of \$50.00.

It is true that a statute may be declared unconstitutional in part, and valid in part, but that can only occur when the provisions can be separated and made independent. In this statute it cannot be done; the provisions are so interdependent that the entire statute must stand or fall together. The same may be said of this provision that has been said of the former provisions, it can only be regarded as punitive damages, as a penalty for the violation of law, and cannot be sustained where no law has been violated. There are several respectable authorities sustaining a provision of that char-

acter, but in every instance there was a violation of a statute emanating in the police power of the state, and where it was expressly made a penalty for such violation. The same principles and reasoning applied to other parts of the statute are equally applicable to this. See also *Calder v. Bull*, 3 Dall. 386.

In *Durkee v. Janesville*, 28 Wis. 464, it is said: "The genius, the nature, and the spirit of our state government amounts to a prohibition of such acts of legislation, and the general principles of law and reason forbid them."

In *Wilder v. Railway Co.*, 70 Mich. 382, the statute allowing an attorney's fee to be taxed as part of the costs was held unconstitutional, where it was made a part of the penalty for failure to fence the road as required by law. The court said: "Calling it an 'attorney's fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. Here the legislature has granted special advantages to one class, at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to enforce them to impose penalties in the disguise of costs upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defense in the courts when suits are brought against them.

"It was suggested by plaintiff's counsel, upon the argument, that the \$25.00 was not imposed by the statute as a matter of distinction between the suitors, but as a punishment to the corporation for not obeying the law as to the fencing of its right of way, and that, if the railway company properly fenced its track, and complied with the law, it might then

stand equal in the courts with the plaintiff in actions of this kind. But penalties cannot be prescribed and enforced in this way, and, whatever may have been the object or intent of the legislature, the result of the statute is an injustice and an inequality as before shown, which the courts cannot tolerate, and must disregard in the administration of the laws."

This case has since been followed in that state. See *Schut v. Railway Co.*, 70 Mich. 433; *Rinear v. Railroad Co.*, 70 Mich. 623.

I am not prepared to go to the extreme length of the Michigan case and hold that an attorney fee could not legally be made a penalty for failure to comply with a law, but, as before stated, I am satisfied that the statute under consideration is clearly unconstitutional as it now stands.

The questions are of great importance; have been often presented, but not authoritatively met. In this case they could not be avoided.

This court not having final jurisdiction where constitutional questions are involved, we enter upon it with great reluctance. Whether our views are sustained or reversed, it may precipitate a final disposition of the questions presented.

The judgment is reversed and a new trial ordered according to the principles of the common law, disregarding the statute in question.

Reversed.

MADELEY ET AL., APPELLANTS, v. WHITE ET AL.,
APPELLEES.

PRACTICE—EQUITY—COSTS.

One White recovered judgment in justice court against Madeley & Brophy for \$297 and costs. Madeley & Brophy appealed to the county court, and while the appeal was pending sent C. to com-

promise and adjust the matter, giving him \$135 for that purpose. C., as he and his principals supposed, succeeded in effecting a compromise. At the time of the supposed adjustment White executed and delivered a receipt for \$175, reciting that it was in full payment and settlement of the case pending on appeal.

The receipt was not filed in the county court, but the appeal was dismissed. The justice to whom the case was remanded issued an execution on the judgment for the entire amount, and the constable proceeded to make a levy.

Madeley & Brophy brought this action to obtain an injunction against White, and the justice, and constable, to restrain them from further proceedings under the judgment and execution. At this time White repudiated the receipt, admitted its delivery, but claimed that he had received only a note for \$40, and \$50 cash. *Held*—

1. That as the receipt was not in full of the amount of judgment except by agreement of the parties, and when challenged, it could not be held a discharge.
2. The transactions between Madeley & Brophy and their agent C. could not affect White.
3. The receipt not having been filed in county court, and the judgment satisfied, it was, in the district court, open to explanation.
4. The appeal having been dismissed without action upon the receipt, neither the county court nor justice could recognize or act upon it.
5. Where the evidence is conflicting, the finding of the jury on the facts is conclusive.
6. Where parties are forced to institute an action to obtain credit for a sum admitted to have been paid, the costs should not be taxed against them.

Appeal from the District Court of Phillips County.

Mr. QUIT. BROWN, for appellants.

No appearance for appellees.

REED, J., delivered the opinion of the court.

This is a peculiar case, legally and morally unique, in showing how many complications may arise in a case, and how many eccentricities may be indulged in, in the attempted disposition of a case in courts of justice.

In 1888, White brought suit against Madeley & Brophy before Helland, a justice of the peace, and obtained judgment

for \$297 and costs. An appeal was taken to the county court. While the appeal was pending, Madeley & Brophy sent their agent, Callaghan, to compromise and adjust the matter, giving Callaghan cash, \$135, for such purpose. Callaghan, as he and principals supposed, succeeded in effecting a compromise. Callaghan testifies he paid the \$135 furnished by his principals, and put in a note he held against White for \$40 to make up the balance. The amount of the note was afterwards paid by Madeley to Callaghan. At the time of the supposed adjustment, White executed the following paper, which was by Callaghan delivered to Madeley, and Madeley & Brophy paid all costs accrued to that time :

“In consideration of one hundred seventy-five dollars to me in hand paid, by C. H. Madeley, I hereby and by these presents enter full payment and settlement of the certain case of Thomas White v. James P. Brophy and Chas. H. Madeley now on appeal before the county court of Logan county, Colo., and as per stipulation to be tried January 22, '89. Witness my hand and seal this day of February 5, 1889.

“THOMAS WHITE [SEAL.]

“Witness { HARVEY J. ALLEBERY.
 { O. CALLAGHAN.”

Madeley & Brophy, supposing the whole thing settled, retained the paper and gave the matter no further attention; Barnes, their attorney, made a grave mistake. Instead of filing the paper in the county court and having the judgment satisfied and discharged, dismissed the appeal. The county court issued a *procedendo* and remanded the case to the justice of the peace. About this time, but whether before or after issuing the *procedendo* does not appear, he became possessed of the paper executed by White—took no action upon it—afterwards returned it to Madeley. The justice of the peace issued an execution for the entire judgment (\$297), and the constable proceeded to levy it and make the money; their attention was called to the paper and it was disregarded.

Madeley & Brophy brought this suit in the district court, setting up the facts above stated, and praying an injunction restraining White, Helland (justice of the peace) and Carson (constable) from proceeding to make the money. At this stage of the proceedings White ignored and repudiated the receipt given, admitted its execution and delivery, but claimed that he had never received \$175 from Callaghan, but only the note for \$40 and \$50 cash, making \$90; that Callaghan was to have paid the remaining \$85 in a few days, but it had not been paid. A trial was had to a jury in the district court, upon the issues of fact.

That Madeley furnished Callaghan the \$135 cash, and paid him the balance for the note, was established beyond controversy. The fact was also established that Madeley & Brophy were never informed by White that the amount of the receipt had not been paid by Callaghan, and that no demand had ever been made upon them by White.

The only witnesses present and examined in regard to the settlement were White and Callaghan, the former swearing he only received \$90, and the latter that he paid the entire sum of \$175. The jury believed White and discredited the testimony of Callaghan; set aside the receipt and allowed only the \$90 admitted by White.

The court allowed the \$90 as a credit upon the judgment; refused an injunction as to the balance, and gave judgment against the plaintiffs for the costs. From such judgment the appeal was prosecuted to this court.

A very brief discussion of the questions presented will be sufficient. First, the receipt for \$175 not being in full of the amount of the judgment, except by agreement of the parties, could not when challenged be held a discharge. To have made it such it must have been accepted as full satisfaction and the judgment canceled of record.

Second. The transactions between Madeley and Brophy and their agent, Callaghan, could in no way affect White.

Third. The receipt not having been filed in the county court and the judgment satisfied, it was in the district court,

412 Co. COMMISSIONERS v. Co. COMMISSIONERS. [Sept. T.,
like all other receipts, subject to explanation, and could be
repudiated by the maker.

Fourth. The finding of the jury upon the facts, upon con-
tradictory testimony, is conclusive upon this court, accord-
ing to the well established rule governing it.

Fifth. The appeal having been dismissed without action
having been taken upon the receipt, either as a satisfaction
of the judgment, or as a credit upon it, neither the county
court nor justice of the peace could recognize it or in any
way act upon it.

This being a suit in equity, and appellants having been
forced to institute it, under the circumstances, to obtain
credit for the sum admitted to have been paid and received,
they should not have been subjected to costs of the suit.
The conduct of White, to say the least, was not such as to
strongly appeal to the conscience of a chancellor. It was
open to severe criticism throughout the entire transaction.
Equity, common justice and decent business morality re-
quired him, after repudiating the paper by him executed, to
credit the amount admitted to have been received upon the
judgment, and not proceed to collect the same money twice.
That, at least, was due to appellants.

The judgment of the district court as to all the costs of
this suit will be reversed, and they will be taxed, including
the costs in this court, against appellee, White. The balance
of judgment and decree will be affirmed.

Modified.

| 2 412 |
| 30s 128 |

THE BOARD OF COUNTY COMMISSIONERS OF GUNNISON
COUNTY, APPELLANT, v. THE BOARD OF COUNTY COM-
MISSIONERS OF SAGUACHE COUNTY, APPELLEE.

1. JURISDICTION.

In an action between counties under the act of 1887 (Sess. Laws, p. 238),
to establish a boundary line, the court has jurisdiction to render

judgment upon the evidence, and is not limited to a determination of the accuracy of the line run by the state engineer.

2. VENUE—PRACTICE.

When an action is commenced in the wrong county the remedy is to apply, upon a showing of cause, for a change of venue.

Appeal from the District Court of Saguache County.

Mr. DEXTER T. SAPP, for appellant.

Mr. JAMES M. DENNY, for appellee.

BISSELL, J., delivered the opinion of the court.

An act of the legislature, passed in 1872, created the counties of Saguache and Lake, and defined their respective boundaries. The northeastern boundary of Saguache county, according to the calls of the statute, was to run in a northwesterly direction along the summit of the Sangre de Christo range "to the top of Poncho pass." The southern boundary of Lake county, by the calls of the section of the act which established it, ran east along the north boundary of Saguache county "to the top of the range at Poncho pass." No dispute ever arose between Saguache and Lake counties with reference to the location of the north and south boundaries of those two counties. Later, and in 1887, the territory embraced in the geographical subdivisions previously established was again subdivided, and the county of Gunnison created. According to the calls of the statute establishing that county, it commenced at a point on the south line of Lake county, where the said line crosses the summit of the range of mountains forming the watershed between the waters of the Arkansas and Colorado rivers, known as the "Saguache Range." For some years after the passage of this act no question was made concerning the initial point of the southern boundary of Gunnison county. In 1887, however, the interests of the people of a certain section in Gunnison county provoked a discussion as

to the point which should be taken as the one from which the line should start. The present action was brought by Saguache county against Gunnison county under the act of 1887, to settle the dispute concerning this boundary. The act of 1887 (Sess. Laws 1887, p. 238) provided generally that when the boundary lines of any county were uncertain, and the territory was in dispute between the two territorial subdivisions, the state engineer might be called upon to run the line and determine the question. The act further provided that, if the action of the engineer was unsatisfactory to either of the counties, suit might be brought in a court of competent jurisdiction within six months after the plat was filed by the state engineer, to determine and settle the boundary. The state engineer ran and fixed the line in 1887, and filed the plat in April, 1888, and in May following the present suit was brought.

Two questions only were discussed by counsel on the argument, or are presented in their brief. The first is as to the jurisdiction of the court to render a judgment on the evidence establishing the boundary line between the two counties. The argument assumes that the power of the court to render judgment is limited to the determination of the accuracy of the line as run by the state engineer, and deprives it of the power, under the evidence, to adjudicate what the line may be, regardless of the testimony which may have been introduced on the subject. The statute cannot be properly thus limited. It broadly confers upon a court of competent jurisdiction the power to determine and settle the disputed line, and it must be held that the jurisdiction conferred is ample enough to enable the court, on the testimony before it, to determine what the line is, and where it should be run. The collateral objections that the suit was brought in the wrong county, and that the district court of the seventh judicial district was without authority to hear and determine the matter, are likewise without foundation. The action was brought, and the defendant appeared and answered, a replication was filed, and on the issue thus framed

the cause was heard and determined. Under these circumstances, it must be held that the district court of that district was possessed of ample authority to render judgment in the controversy. This question has been fully settled by a recent adjudication of the supreme court. *Fletcher v. Stowell*, 17 Colo. 94. According to that decision, there is no territorial limit to the civil jurisdiction of the district court. If the action is brought in the wrong county, the only remedy is to apply to the court for a change of venue, for which good cause must be shown. There is an entire absence of any showing of this description, and, according to that authority, the district court where the case was tried had full jurisdiction to hear and determine it, and its judgment must be held binding, unless there be some other good reason for setting it aside.

The only other objection urged by counsel is that it is not in accordance with the testimony. The rule in such a case is clear, definite, and well settled. No judgment will be disturbed upon this ground unless the record shows that it comes clearly within the exception to the general rule. As the case is presented to this court, it is impossible to say that it comes within the exception. It was rendered upon conflicting testimony, and on this evidence the court rendered a judgment establishing the line between the two counties; and, while it is possible this court might have reached another conclusion if originally called upon to determine the question, yet it is not clear that the judgment is so unsupported by the evidence as to permit this court to depart from the settled rule governing such cases. Perceiving no error in the record which calls for a reversal of the judgment, it will be affirmed.

Affirmed.

GREENE ET AL., PLAINTIFFS IN ERROR, v. LATCHAM,
DEFENDANT IN ERROR.

2	416
19c	95
2	416
18	454

STATUTE OF FRAUDS.

Where plaintiff parted with nothing in consideration of defendant's promise to pay the debt of another; did not surrender the right to enforce its claim against original debtor, or waive any lien upon his property, the promise not being in writing, was within the statute of frauds and void.

Error to the District Court of Arapahoe County.

Mr. JAMES H. BROWN and Mr. MILTON SMITH, for plaintiffs in error.

Messrs. COE & FREEMAN, BENEDICT & PHELPS, and Mr. LUCIUS W. HOYT, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

On the 10th of August, 1888, Frank Latcham, defendant in error, made a contract with one C. G. Vaughn for the construction and erection of a dwelling-house and barn in the city of Denver.

Thereafter in the month of September, 1888, Vaughn contracted with the Chicago Lumber Company, plaintiffs in error, for the lumber and building materials required to perform his contract with Latcham.

After a portion of the lumber and building materials had been furnished to Vaughn by the company on the contract, and about the 6th of October, 1888, a conversation occurred between defendant, Latcham, and Fred C. Fisher, a member of the Chicago Lumber Company, in which conversation Latcham expressed himself as dissatisfied with the progress that Vaughn was making in the construction of his house, and said that unless Vaughn made more rapid progress in its erection, he would complete it himself; that he had had

bad reports about Vaughn and wanted to know as to his responsibility. Whereupon Fisher suggested that the reports might be made by other lumber dealers for the purpose of diverting business from the company to them, and in doing that they might unconsciously injure Vaughn, and it was possible that their statements were not correct; that Vaughn had been doing business there, and the company had no reason to think but what he was responsible.

Q. What, if anything, was said about the payment for these materials? A. Well, the question then arose—of course I didn't know Vaughn very well; he had traded with us perhaps sixty days.—I asked him what was going to become of our lumber account, and he replied that he would pay our lumber account. That was substantially all that was said at that time.

The testimony shows that the company continued to furnish all the materials that were ordered, and Fischer further testifies that they relied upon Latcham's statement.

One Brown, foreman of the Chicago Lumber Company, testifies that Latcham said he would see that the lumber was paid for. It is further in testimony that Latcham had informed a Mr. Rundle that he had been fool enough to agree to secure the Chicago Lumber Company their bill, but that he would not pay any other bills contracted by Vaughn.

It is also shown by the testimony that all of the lumber delivered was charged to Vaughn, and receipted for by him or his employee; that the account on the books was not transferred to Latcham, and that the company were constantly calling on Vaughn for payment of the bill; that no account was ever made, put or presented to Latcham; and that prior to the institution of the suit the company, through its representative, filed a claim for a lien upon the house for lumber furnished.

The evidence also shows that the company was well aware of the fact that Latcham was continually paying Vaughn on his contract as he progressed with the construction of the house, and on several occasions made inquiries as to the

amount that was due Vaughn under the contract, and yet at no time did they inform Latcham that they were holding him under his promise of payment for the amount of their claim.

This is substantially all of the testimony upon which the plaintiff sought to recover the sum of \$1,260 from Latcham for materials furnished in the construction of his house.

After plaintiffs had introduced their testimony defendant interposed a motion for judgment, and the court instructed the jury that the agreement between the company and Latcham was a promise to answer for the debt of another, and not being in writing was void, and that their verdict must be for the defendant. In compliance with the instruction the verdict was so returned, and judgment entered against the plaintiffs. To reverse this judgment this writ of error is prosecuted.

It is contended by plaintiffs in error that the promise of Latcham was an original one and not collateral; that inasmuch as he derived a benefit from the furnishing of the lumber by the company, which was used in the construction of his house, that his promise was made on a good consideration, and was unaffected by the statute of frauds.

The contention of defendant in error is that the language used did not amount to a promise to pay on the part of Latcham; that inasmuch as Vaughn continued to perform the contract, and the company continued to deliver the lumber upon his order and to charge it to him, that there was no new consideration moving from the company to Latcham, and no change of the relation of the parties was created. That, practically, the understanding of the conversation was that if Vaughn was discharged in such case Latcham would then become responsible for the lumber furnished by the company.

We think that the District Judge was clearly right in holding that the contract as proved was void under the statute. There was no new consideration for the defendant's promise. The evidence does not show that the company

surrendered any right to enforce its claim against Vaughn or agreed to waive any lien upon the property of Latcham in view of the promise. In fact, the evidence discloses a simple statement on the part of Latcham to the effect that he would pay for the lumber, and it strongly tends to establish the fact to be that the company continued to believe in the responsibility of Vaughn, as they did not change the relation then existing between the company and Vaughn by transferring the account to Latcham; they did not inform Latcham that lumber would be delivered upon his order. On the contrary, they continued to respond to the orders of Vaughn for lumber upon his contract with Latcham as well as upon other contracts. The company surrendered nothing, nor did it agree to extend future credit to Vaughn by reason of the promise, nor was there any assent or understanding between Vaughn, Fischer and Latcham that Latcham should pay the company for the lumber furnished.

Plaintiffs in error have presented their side of the question with great ability, but we think that their contention is unsupported by authority, and especially by modern authority.

Justice Gray in delivering the opinion of the court in the case of *Brightman v. Hicks*, 108 Mass., 246, uses this language: "The law is well settled in this commonwealth that, when property subject to a lien is transferred by the debtor to a third person, the latter is not liable to an action by the creditor, unless he has made a direct promise either to the debtor or the creditor to pay the debt; and that such a promise to a creditor, who neither gives up his claim against the original debtor, nor any lien upon the property, is a promise to answer for the debt of another, and must be in writing in order to satisfy the statute of frauds."

This doctrine is followed in *Vaughn v. Smith et al.*, 65 Iowa, 579. This latter case is analogous to the one at bar. That was a case where a plaintiff had a claim and a right to a mechanic's lien against defendants, and defendants promised that if he would not commence proceedings, nor file any

mechanic's lien to secure his claim before a certain date, they would pay the claim, and plaintiff accepted the proposition, and defendants then paid part of the claim, but refused to pay the remainder when it became due by the terms of the proposition, but plaintiff neither released the original debtor nor relinquished his right to a lien, held that the plaintiff parted with nothing in consideration of the defendants' promise, and the promise being to pay the debt of another, and not being in writing, was within the statute of frauds, and could not be established by oral testimony.

In *Ackley ex., v. Parmenter*, 98 N. Y. 425, it was held that, "To take the case out of the statute there must be a consideration moving to the promisor, either from the creditor or the debtor, and beneficial to him, thus imparting to the promise the character of an original undertaking."

A like rule is laid down in *Morrissey v. Kinsey*, 16 Neb., 17.

In *Birchell v. Neaster*, 36 Ohio, St. 331, it is held that, A promise to answer for the debt, default or miscarriage of another, either in writing or verbal, unsupported by a consideration, cannot be enforced either under the statute or independent of it. And that the statute requires a promise to answer for the debt, default or miscarriage of another though supported by a consideration, to be in writing. This case is similar to the one at bar. It was an action brought to recover the balance claimed to be due on material and labor in and about the plastering of a house belonging to the defendant, and also to enforce a mechanic's lien which was alleged to have been secured under the statute.

In *Krutz et al. v. Stewart*, 54 Ind. 178, it was held that, A promise without any consideration to support it would be *nudum pactum*, and void at common law, without any reference to the statute of frauds. And since the statute, promises may be made upon sufficient consideration to support them, which will still be void, not being in writing as required by the statute. *Haverly v. Mecur*, 78 Pa. St., 257; *Hooker et al. v. Russell*, 67 Wis. 257; *Bates v. Donnelly*, 57

Mich. 521 ; *Weyer et al. v. Beach*, 14 Hun, 231 ; *Willard v. Bosshard*, 68 Wis. 454.

In a recent case in the court of appeals, N. Y., reported in 15 N. E. 818, it was held that, "Original promises as distinguished from collateral promises, under the statute of frauds required to be made in writing, are such as are founded on a new consideration, the debt antecedently contracted for still subsisting, moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor."

It is wholly unnecessary to quote further authorities in support of the conclusion reached. It is sufficient to say that we have thoroughly examined many authorities, early and late, and are of the opinion that the weight of modern authority supports the rule as announced in Massachusetts.

We are unable to concur in the position assumed by defendant's counsel that this was a case for the jury, as the evidence would not warrant a verdict for the plaintiff. For as before stated, The Chicago Lumber Company made no agreement whereby their relation with Vaughn was changed ; they had not even declared that they would not furnish the lumber necessary to construct the house under the contract between Vaughn and Latcham. They surrendered nothing, continued to hold Vaughn liable, accepted his orders for lumber and his receipts for the same ; charged the lumber so furnished in the contract of Latcham's house in with the general account of Vaughn and knew that Vaughn was receiving money in payment for his labor and material under his contract from Latcham ; and subsequently, through their representative or agent, a lien was filed upon the premises and Vaughn was continually importuned for payment. This is a case in which, in our judgment, a faithful observance of the statute of frauds requires us to say that the promise on the part of Latcham is void for want of a writing.

The judgment must be affirmed.

Affirmed.

2	422
4	404
4	478
2	422
6	478
7	61
2	422
8	422

**PALMER, ASSIGNEE, ETC., APPELLANT, v. MCCARTHY,
APPELLEE.**

1. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

A deed of assignment for the benefit of creditors, to be valid, must show upon its face that it was intended to embrace all of the property of the assignor.

2. SAME.

A failure to comply with the requirement of the statute with respect to a list of the creditors and an inventory of the estate under oath, will invalidate the deed of assignment.

3. PAROL EVIDENCE INADMISSIBLE, WHEN.

Parol evidence is inadmissible to show that property, not described in the deed of assignment or in the inventory, was intended to pass under the deed.

Appeal from the District Court of Pueblo County.

THIS was an action of replevin brought by appellant, plaintiff below, against the appellee, sheriff of the county.

One D. C. Bowne engaged in mercantile business in the city of Pueblo, on the 3d day of August, 1889, attempted to make an assignment for the benefit of creditors under the Statute of 1885.

1 Mills Ann. Stat., chap. 9, § 169, Acts of 1885, p. 43.—
“Any person may make a general assignment of all his property for the benefit of his creditors, by deed, duly acknowledged, which, when filed for record in the office of the clerk and recorder of the county where the assignor resides, or, if a nonresident, where his principal place of business is, in this state, shall vest in the assignee the title to all the property, real and personal, of the assignor, in trust, for the use and benefit of such creditors.”

Sec. 170.—“The assignor shall annex to such assignment an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, with the estimated value thereof, and also a list of his creditors, giving their

names, residence if known, and the amount of their respective demands ; but such inventory shall not be conclusive of the amount of the assignor's estate, nor shall the omission of any property from such inventory defeat the assignment or conveyance of the same."

Sec. 171.—"No such deed of general assignment of property by an insolvent, or in contemplation of insolvency for the benefit of creditors, shall be valid, unless by its terms it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

And, in pursuance of such attempt, made and executed the following paper :

"Know All Men by These Presents, That I, D. C. Bowne, residing and doing business in the city and county of Pueblo, state of Colorado, for value received, do hereby grant, bargain, sell and convey to W. W. Palmer of the same place, all of the accounts, debts, dues, notes, bills, bonds and demands, goods, wares and merchandise named and specified in a schedule and inventory to be hereinafter filed, to have and to hold the same to him, the said W. W. Palmer, and to his assigns in trust only, and to collect, sue for, demand, receive and recover all such sums of money as may be due, owing, and payable thereon ; and to sell said goods, wares and merchandise as the court may direct, and as shall be for the best interest of all parties, and after paying all reasonable and proper costs, charges and expenses out of the proceeds thereof, to pay each and all of my creditors the full sum that may be due and owing by me to them, of which creditors, a list, together with a true amount of my indebtedness to them severally is shown in a schedule signed by me and marked 'Schedule A,' and if the proceeds of said goods, wares and merchandise, and chattels, shall not be sufficient fully to pay all and every of my said creditors, then to pay them pro rata in proportion to the amount due and owing to each of them, but if the proceeds thereof shall be more than sufficient to satisfy and pay all my indebtedness to my said creditors then the said W. W. Palmer is to pay and return to me the bal-

ance, if any should be left after paying my said creditors aforesaid, and all costs incurred herein. And I do nominate, constitute and appoint the said W. W. Palmer our true and lawful attorney, irrevocable by me, and for every purpose connected therewith, to ask, demand, sue for, collect, receive and recover all and singular such sum or sums of money as now are or may hereafter become due upon, for, or on account of, any of the property, effects, choses, or things in action, or demands above assigned, giving and granting unto my said attorney full power and authority to do and perform every act, deed or thing requisite and necessary in the premises, as fully to all intents and purposes as I might or could do, if this assignment had not been made, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute may lawfully do in the premises, by virtue thereof."

On the 12th day of August, Bowne filed a partial list of creditors with the approximate amount due each, at the bottom of which occurs the following: "Amount of stock on hand about \$35,000."

"State of Colorado, County of Pueblo, ss.

"D. C. Bowne, who personally appeared before me, J. S. Stewart, county clerk, deposes and says that the facts contained in the foregoing schedule, wherein his liabilities and assets are set forth, are true and correct, to the best of his knowledge and belief.

"In witness whereof, I have hereunto set my hand and seal, this third day of August, 1889.

"J. S. STEWART,
County Clerk.

[SEAL.]

"By Thomas Thompson, Deputy."

McCarthy (appellee) was sheriff of Pueblo county. On August 3, 1889, The Central National Bank of Pueblo sued out a writ of attachment against assignor Bowne. It was, by the sheriff, levied upon the goods mentioned in the complaint as the property of Bowne. On the same day F. L. Strang & Co. sued out an attachment against the same

party, which was, by the sheriff, levied upon the same goods. On the same date the Pueblo Hardware Co. sued out an attachment, which was levied upon the same goods; also, on the same date, James G. Johnson & Co. sued out an attachment which was levied upon the same goods. On the 5th day of August, the suits of Central National Bank and Strang & Co. against Bowne were settled, and attachments released, but the goods were still held under the attachments of the other parties named. From the 5th to the 14th of the same month Newall Bros. Manufacturing Co., Eberhard Faber, The Japanese Fan Co., Koch Sons & Co. and Edward Scheitlin & Co. commenced suits by attachment in the county court of Pueblo county, which were levied upon the goods which were attempted to be conveyed by the assignment. On August 7th, appellant, as assignee of Bowne, filed his complaint in the usual form, alleging that by virtue of the assignment he was entitled to the possession of the following described goods and chattels, to wit: "A certain stock of leather and millinery goods, now situate in the leather and millinery department of a certain building, known as The Bon Marche building, situate on the corner of Seventh street and Santa Fe avenue, in the city of Pueblo, in said county and state, the same being part of a general stock of merchandise formerly owned and possessed by one D. C. Bowne, and being all the goods situate in the said leather and millinery department of the said Bon Marche building."

And that the same were withheld from him by McCarthy. Defendant, McCarthy, answered generally and specifically, first, denying all the material allegations in the complaint; second, that the pretended deed of assignment was made for the purpose of hindering, delaying and defrauding his creditors from collecting their respective claims, and that said plaintiff had full notice of such intent on the part of Bowne: that the pretended deed of assignment was void on its face—alleging his official position of sheriff, and that as such he levied the attachments above mentioned, and that he held the goods, as sheriff, by virtue of such attachments, and not

otherwise. A replication was filed by plaintiff as to the matters contained in the second defense. On Dec. 7, 1889, the case came on for trial before the court without a jury. Upon the trial, the supposed deed of assignment from Bowne to the plaintiff was offered in evidence, objected to by the defendant for the following reasons :

“First. Said instrument does not purport or pretend to convey all of the property of the assignee as required by the statute, and does not purport to be a general assignment.

“Second. Said instrument does not purport or pretend to provide for the distribution of his property, or the proceeds thereof among all the assignor’s creditors, and the said pretended deed is not by its terms made for the benefit of all his creditors in proportion to the amount of their respective claims.

“Third. The pretended deed of assignment has no schedule attached of the assignor’s property, as required by the statute of Colorado, and does not in its terms state that all of the assignor’s property is conveyed, or pretended to be conveyed by the said assignment.

“Fourth. There is no list of the creditors attached to the instrument such as is required by statute.

“Fifth. The affidavit to the list of creditors is not in accordance with the laws of 1885.”

The court sustained the objections and refused to admit the deed in evidence. W. W. Palmer, the plaintiff, was called in his own behalf, and the following offers of proof were made :—

“We offer to prove by this witness who is the assignee in this case, that D. C. Bowne was doing business in the city of Pueblo, and only had one place of business in the city, and that all his property consisted of this stock of goods. We further desire and offer to prove by this witness that on the third day of August he took possession of this stock of goods, that the possession was turned over to him by D. C. Bowne, and that immediately thereafter this plaintiff caused

a true and perfect inventory of said goods and chattels to be made and filed in this court.

“We further offer to prove by this witness that on the twelfth day of August he caused the inventory of said goods and chattels to be filed with the clerk of the district court of this county, and that the cost value of said goods laid down in the city of Pueblo was \$31,071.18.

“We further offer to prove by this witness that on the twelfth day of August, 1889, this witness executed a bond in the sum of sixty-three thousand dollars, which bond is fully set forth in folios 78 and 79.

“August 12th, 1889, bond filed and approved.

“We further offer to prove by this witness that the goods and chattels in controversy in this case are part of the said goods and chattels described in said inventory, and which were taken possession of by plaintiff on the 3d day of August; and that the levy of each of the attachments was made after the same came into the hands and possession of plaintiff.

“We further offer to prove by this witness that all the acts of possession performed by plaintiff in regard to said stock of goods were done in pursuance of the deed of assignment which was offered in evidence.” To which defendants objected, and the objections were sustained by the court. The court awarded judgment against the plaintiff in the sum of \$942.03, damages and costs, from which judgment the appeal was prosecuted to this court.

Mr. M. B. GERRY and Mr. M. G. SAUNDERS, for appellant.

Mr. JOHN W. SLEEPER, for appellee.

REED, J., after stating the facts, delivered the opinion of the court.

An assignment, under our statute, cited above, to be valid must be a general assignment of all the property, real and

personal, of the assignor, and the deed, upon its face, must show that it embraces all the property of the assignor. The language of the statute is: "*may make a general assignment of all his property for the benefit of his creditors by deed,*" etc.

In *Barnitz v. Rice*, 14 Md. 24, it is said: "We do not wish to be understood as saying any particular words are necessary to be used, but only that such must be employed as will convey all the debtor's property. All that is required is that the words should comprehend all, and thereby negative every presumption that there is other property." See *McClurg v. Lecky*, 3 Pen. & W. (Pa.) 83; *Grover v. Wakeman*, 11 Wend. (N. Y.) 187; *Gadsden v. Carson*, 2 Rich. Eq. (S. C.) 252; *Gibson v. Finley*, 4 Md. Ch. Dec. 75; *Ins. Co. v. Wallis et al.*, 23 Md. 182.

It is a well settled rule of construction, that when the deed in general terms, purports to convey all the property, and afterwards enumerates and designates the property assigned, such special designation controls the general words, makes the assignment special instead of general, and renders the deed inoperative and void. Burrill on Assign. 192, 195, 485; *Barnitz v. Rice*, *supra*; *Bock v. Perkins*, 28 Fed. Rep. 123; *U. S. v. Howland*, 4 Wheat. 103.

There are in the deed of conveyance no words evidencing either the desire or intention to convey all the property of the assignor; the only conclusion that can be legally deduced from the language used is that the assignment was to be special, of the property enumerated, viz., "all of the accounts, debts, dues, notes, bills, bonds and demands, goods, wares and merchandise, *named and specified in a schedule and inventory to be hereinafter filed.*" The language used instead of negating every presumption that there was other property, not conveyed, would clearly indicate that the property conveyed was specially selected and set apart from the body of the estate. It follows from the authorities cited that in this respect the deed was void and invalid.

There was also an absolute failure to comply with sec. 170. No inventory was annexed to such deed of assignment. All

that was said is, "amount of stock on hand about \$35,000." What kind of stock? The word stock in no way connects the schedule with the property assigned; there was no assignment of "stock" made, nor was there any inventory made of any property designated and attempted to be conveyed by the deed. It may, possibly, by the words "goods, wares and merchandise," used, be inferred that the assignor was engaged in a mercantile business, but there is no such assertion. The only statement is, "that he was residing and doing business in the city and county of Pueblo." It would be equally true, and the word "stock," used in the supposed inventory, equally applicable, if he was engaged in raising sheep, cattle or horses.

By the same section (170), the assignor is required to give a list of his creditors, their names, residences, if known, and the amounts of their respective demands. Only a partial list of creditors was given—the records of the court show a half dozen or more firms and individuals, whose names did not appear in the list, instituted proceedings by attachment before the list was made out and filed. Clearly, no honest attempt, even, was made to comply with the statute. The assignor is also required to verify the inventory and list of creditors, under oath. The proceedings were, in this respect, fatally defective. The statute, as in all cases where such language is used, requires an affidavit subscribed by the party, and the certificate of an officer that an oath was administered—neither appears.

The deputy clerk certifies he appeared, not before him, but before "J. S. Stewart, County Clerk," etc. These statutory provisions cannot be dispensed with—a material failure to comply with them or a serious departure vitiates the whole proceeding. The inventory required is for the purpose of identification. The deed may in general terms convey all the property of the grantor in trust for all creditors. The inventory required by law, when attached to the deed of assignment, becomes a part of it—designates and defines the conveyance by showing the amount, quantity and spe-

cific character of each and every part of the estate conveyed; without it, as in this case, the words of conveyance being so general, nothing passes, for there can be no identification; hence, the wisdom and necessity of a sworn inventory as required by statute, and of a strict compliance with it. The necessity of a full and complete inventory is emphasized and illustrated in this case. The goods to be taken by the writ were described in the complaint as "a certain stock of leather and millinery goods now situate in the leather and millinery department of a certain building, known as the Bon Marche building," etc. No such goods were conveyed, nor embraced in the inventory; there was nothing to connect them in any way with the property conveyed. That could only be done by parol evidence, which was inadmissible, and properly excluded by the court. As can be seen at once, the effect, if admitted, would be to make, by parol, a deed required by statute to be in writing executed by the grantor, verified by his oath and of record. It would not be to explain and apply the conveyance, but to supply the subject-matter, the property conveyed, required by statute to be embraced in it.

The judgment of the district court will be affirmed.

Affirmed.

WARNER, ET AL., PLAINTIFFS IN ERROR, v. THE TOWN
OF GUNNISON, DEFENDANT IN ERROR.

1. MUNICIPAL AUTHORITY.

The power of the legislature to confer municipal jurisdiction, save as controlled by constitutional restrictions, is practically unlimited.

2. EMINENT DOMAIN.

Cities and towns are authorized to exercise the right of eminent domain, by condemning private property for public uses. To supply water for the use of a community is one of the duties imposed on a municipality, and property taken for that purpose is taken for a public use.

2	430
24c	400

2	430
28s	501
29s	90

3. SAME.

A town or city may, for the purpose of supplying its inhabitants with water, exercise the right of eminent domain by condemning private property without the corporate limits.

4. STATUTORY CONSTRUCTION.

Statutes tending to effect an object of great public utility, ought to receive the most liberal and benign interpretation.

5. PRACTICE IN EMINENT DOMAIN PROCEEDINGS.

Under the eminent domain act, the question of necessity for taking the property for municipal purposes, is not for the jury to determine,—that being wholly within the province of the municipal authorities.

6. SAME.

The issues in a condemnation proceeding may be tried either in term time or vacation. When tried to a jury in term time, it must be before the jury drawn in the ordinary way to serve at that term.

7. JUROR—GROUNDS OF CHALLENGE.

The interest of a juror as a member or citizen of a municipality which is a party to the proceeding, does not disqualify him.

8. PRACTICE.

When a party's objection to the introduction of testimony was sustained, he will not be heard to complain that it was not introduced.

Error to the County Court of Gunnison County.

Mr. D. T. SAPP and Messrs. GULLETT & CRUMP, for plaintiffs in error.

Mr. B. H. WEGENER, for defendant in error.

BISSELL, J., delivered the opinion of the court.

The town of Gunnison instituted a proceeding under the eminent domain act to obtain a right of way through the property of the plaintiffs in error for the construction of a ditch for the carriage of water for the uses of the town. The petition was filed in the county court. Some of the defendants answered. The company took issue on the petition. It also set up two affirmative defenses. One was based on the allegations that the town had failed to demand the right to construct the ditch and offer to agree upon a compensation, that there was another irrigating ditch run-

ning across and through the premises which could be made available for the purposes of a water supply, and that the land sought to be condemned lay entirely outside of the limits of the municipality. The other affirmative plea set up that there was an irrigating ditch which had been used to supply the town with water, and that it was ample for the purpose. The petitioners demurred to these defenses. This statement is broad enough when taken with the discussion of the various assignments of error to enable the questions decided to be understood.

The jurisdiction of municipal authorities is usually limited to the territory occupied by the corporation. For this reason proceedings in condemnation cannot ordinarily be instituted as to property outside the corporate limits. The sufficiency of the second defense which pleaded the locus of the property in bar of the proceedings manifestly rests on the applicability of this principle. It cannot control this action. The power of the legislature to narrow or broaden municipal jurisdiction, save as controlled by constitutional restrictions, is practically unlimited. The right to condemn private property for these public uses, under proper constitutional safeguards, has apparently been granted by the statutes on towns and cities. If the acts bear the interpretation contended for by the petitioners this defense was unavailing. To correctly interpret the statutes and determine their significance, the purpose must not be lost sight of. To furnish organized communities with an abundant supply of pure and wholesome water is one of the duties imposed on the municipality, and comes clearly within the purview of what is often termed a public use. The right of the legislature to empower towns and cities to exercise the right of eminent domain to secure such results has never been questioned, and wherever the power is conferred, the corporate body is the best judge of the means to accomplish the end. Dillon on Municipal Corporations, 3d ed., §§ 146, 597, *et seq.*

In interpreting the law the intention of the legislature must be carefully considered, and such a construction put

upon the act as may be warranted by its terms, and which will not, unless rendered necessary by the phraseology, be necessarily productive of practical inconvenience to the community. "Statutes tending to effect an object of great public utility, ought to receive the most liberal and benign interpretation, in accordance with the maxim *ut res magis valeat quam per eat.*" *Bearing v. Erdman*, Hazzard's Penn. Register.

"The court in such case, will look into the object of passing the law, and if it can be discovered in its provisions, will not suffer it to be defeated." *Russell v. Wheeler*, Hemp. R. 3; Potter's Dwarries on Statutes, p. 203.

The act concerning towns and cities undertook to confer power on municipalities to construct water ways within or without their limits. This power is granted by section 3312 of this act. Without attempting to quote the section, it is enough to state generally that its provisions are ample to confer authority on the municipal authorities to construct waterworks either within, or without, the corporate limits; to protect the streams from which the water is taken within a certain named distance from their borders, and in general to do whatever may be necessary to erect and protect their system. It necessarily follows, according to the case made by the record, that the corporate authorities were fully authorized, when once they determined on their source of supply within the limits of their power, to proceed under the eminent domain act to condemn the land necessary for the ditch to convey it.

In instructing the jury, the court assumed that the power to determine whether the construction of the works was justified by the necessities of the municipality was wholly within the province of the authorities, and that it was a matter with which the jury had nothing to do. In this the court did not err. According to the provisions of the eminent domain act this question of necessity is not for the jury. The act enumerates what the jury shall state in their verdict. There is nothing in this specification nor elsewhere in

the act which requires them to pass on this question of necessity. But were it otherwise, in the matter of a public use like the present, the question could not be left to their determination, since the general statute (subdivision 74 of section 3312) distinctly grants to the corporation the power of final determination. The question being left by the act to the decision of the municipal authorities, it must be held that it is not a proper matter for the consideration of the jury.

The assignments of error which concern the instructions that were asked and refused are not well laid. The instructions are of doubtful propriety, and there is not enough of the case exhibited in the abstract to enable the court to determine whether in any event they ought to have been given. Such is the condition of the case that if the instructions ought to have been given the error cannot be seen to have prejudiced the parties who complain of it.

Under the eminent domain act the issues presented by the pleadings in a condemnation suit may be tried either in term time or vacation. The mode of selecting the jury is totally different in the two cases. The present case was tried at a regular term of the county court, and the jury was taken from the regular panel, or from that panel as it was filled up by open venires issued for the purpose. The appellants complain that a "struck" jury was not drawn from the twenty-four names which it is the clerk's duty to prepare as the jury basis when the cause is tried in vacation.

The phraseology of the section which directs the mode of procuring a jury to try the issue in vacation possibly furnishes a basis for the contention that this method is to be resorted to in all cases, but there is no clear and unambiguous limitation in that section. This construction would neither be in harmony with the plain meaning of the other provisions of the act, the evident differences in the modes of trial to be adopted in term time and vacation, nor the plainer language of the amendatory act of 1889. When such a cause is tried at a term of the court it must be before the jury drawn in the ordinary way to serve at the term, or

such as may be provided by the court in the exercise of its ordinary and statutory powers.

The appellants likewise complain that their challenge to a juror because he was an inhabitant of the town of Gunnison was not sustained. The statute disposes of this question. Section 9 of the domain act provides that the same right of challenge exists in these proceedings as in all other civil cases, and chapter 13 of the Code of 1887, expressly enacts that the interest of a juror as a member or a citizen of a municipal corporation shall not be made the subject of a challenge.

It is earnestly contended that section 1715 of the General Statutes requires that the party who seeks to obtain the right of way for the purposes of a ditch must make application for the right to the owner of the land and be refused before he can institute proceedings in condemnation. Whatever may be the rule as to private individuals, or whatever might be the rule in the present case under other circumstances, the appellants are not in a position to insist upon that proposition here. The town offered to make the proof. The attorneys engaged in trying the case objected to the testimony. The appellants cannot be heard to complain that the testimony was not put in when it was excluded under the objection of the counsel. The case was on trial, and if the attorneys for a part of the defendants saw fit to leave the conduct and management of the case to those who were present representing other parties, they must be held bound by what was done by them. On coming in they failed to withdraw this objection as to their particular clients, and permit the testimony to be offered. They are concluded.

The remaining question is the only one of much difficulty. The attorneys for the owners of the land asked to open and close the case, and when the right was denied them, saved the question by a proper objection and exception. The present case is not one which calls upon the court to express its opinion whether a denial of the right to open and close is a substantial error which will operate to reverse the judgment.

The authorities differ on this proposition. In condemnation proceedings it is legitimate for the court to permit the defendant to open and close, and where it is done the act will not be adjudged error according to the rule laid down in *Colorado Central R. R. Co. v. Allen*, 13 Colo. 229. In deciding this proposition the court did not directly say where the right to open and close lay. We are therefore free to determine that according to the statute there seems to us to be a portion of the burden of proof laid on the one party, and a portion on the other, and while in our judgment the right to open and close ought probably to be given to the owners of the property, the refusal to accord them that right is not in these cases a substantial and prejudicial error sufficient to reverse the judgment.

These are all the questions which have been discussed by counsel, and which have been discovered in an examination of the record. They were rightly settled by the court below, and this judgment must therefore be affirmed.

Affirmed.

THE ATCHISON, TOPEKA & SANTA FE R. R. COMPANY, ET
AL. PLAINTIFFS IN ERROR, v. THE CITY OF DENVER,
DEFENDANT IN ERROR.

1. BILL OF EXCEPTIONS—RECORD.

When a bill of exceptions conflicts with the record entries in the case, the former must be taken as correct and the latter erroneous.

2. JUDGMENT—CLERICAL MISTAKE.

When a judgment appears to have been entered by a clerical mistake, it will be reversed.

Error to the District Court of Arapahoe County.

Messrs. WELLS, MCNEAL & TAYLOR and Mr. C. E. GAST,
for plaintiffs in error.

Mr. JOHN F. SHAFROTH and Mr. F. A. WILLIAMS, for defendant in error.

REED, J., delivered the opinion of the court.

Plaintiffs in error were prosecuted in the police court for a violation of a city ordinance, prohibiting railroad engines being run at a greater speed than six miles an hour within certain defined limits. For some unexplained reason the two different corporations were joined in the same proceeding. It would appear that both were found guilty in the police court and fined; an appeal was taken to the superior court; that court was abolished, and the case went by legislative enactment to the district court, where a trial was had, resulting in finding the Atchison, Topeka & Santa Fe Co. guilty, and the Denver & Santa Fe not guilty. Both companies appealed.

I am at a loss to understand the appeal of the Denver & Santa Fe Company. It is assigned for error, "that the district court gave judgment in favor of the city and against the defendant, while it appears of record that such defendant was found not guilty." There is some confusion—a variance between the transcript of the record and the bill of exceptions which does not appear in the abstract, but only upon the examination of the record.

The entries are as follows: "On, to wit, the 25th day of February, 1890, * * * the following proceedings were had and entered of record. * * * This cause having been heretofore submitted to the court, and by the court taken under advisement, and the court being now sufficiently advised in the premises, doth find for the plaintiff in the sum of ten dollars, etc. * * *

"And afterwards, to wit, on the same day. * * * It is considered by the court that the plaintiff do have and recover of and from the said defendants, The Atchison, Topeka & Santa Fe Railroad Co. and The Denver & Santa Fe Railroad Co. the sum of ten dollars," etc. From which it

appears an appeal was allowed both defendants. In the bill of exceptions it is said: "The court * * * doth find said defendant, The Atchison, Topeka & Santa Fe Railroad Co., guilty in manner and form as charged in the plaintiff's complaint, and the said defendant, The Denver & Santa Fe Railroad Co., *not guilty*." Whereupon the court gave judgment against The Atchison, Topeka & Santa Fe Railroad Co. for ten dollars, to which that company served an exception.

Which is to control, the transcript or bill of exceptions? It is evident that both cannot be correct. The bill of exceptions appearing on its face to have been accepted as correct by counsel, and being signed and sealed by the judge, must be taken as correctly stating the judgment of the court and the record entries by the clerk as being erroneous. Hence, no writ of error could lie by The Denver & Santa Fe Co., for the reason, first, that there was no finding against it; second, the bill of exceptions shows no exception was taken on its behalf.

As presented the judgments, according to the transcript, would have to be reversed and appeals dismissed, as it is at once apparent a joint judgment against two distinct corporations for the same offense could not stand; while on the facts and judgment, as shown in the bill of exceptions, the judgment against the Atchison, Topeka & Santa Fe Co. should be affirmed. No defense was interposed or testimony offered on the part of either defendant, nor was there any objection taken to the misjoinder of parties defendant, consequently no advantage can be taken of it in this court.

The testimony was very unsatisfactory, discursive and indefinite, but there was testimony deemed sufficient by the district court to make a case in the absence of all defense against the Atchison, Topeka & Santa Fe Co. The judgment, as shown by the transcript of the record against the Denver & Santa Fe Co. evidently having been a clerical mistake, will be reversed.

Affirmed as to A., T. & S. F. Co. *Reversed* as to Denver & S. F. Co.

MATTLE, PLAINTIFF IN ERROR, v. BRIND, ET AL.,
DEFENDANTS IN ERROR.

PRACTICE—PARTIES.

An action on an undertaking in attachment may be maintained against principal and sureties jointly, without first obtaining judgment against the principal.

Error to the District Court of Arapahoe County.

PLAINTIFF in error was plaintiff below. In 1889, Brind (defendant in error) sued out an attachment against Mattler (plaintiff in error) and made an attachment bond, as principal, executed by Adams and DeMange (codefendants in error) as sureties. The bond was in form as required by statute. Brind failed to maintain his suit and the attachment was dissolved. Mattler brought this suit upon the bond against both principal and sureties to recover damage sustained by reason of the proceedings in attachment. Upon the trial it was objected that the joint suit could not be maintained; that the undertaking of the sureties was collateral, not original, and they could only be held liable after a judgment for damages had been obtained against the principal, and a failure by him to pay. This view of the law was taken by the court. A trial was had to a jury, and the court instructed the jury to find for the defendants on the grounds above stated. This is assigned for error, and the case brought to this court for review.

Mr. D. V. BURNS, for plaintiff in error.

Mr. WILLIS STIDGER, for defendants in error.

REED, J., after stating the facts delivered the opinion of the court.

The only question presented is, whether, under our statute and civil code of practice, recovery can be had against princi-

pal and sureties in an attachment bond in the same original proceeding. The obligation is, "If the court shall finally decide that the plaintiff was not entitled to an attachment, the *plaintiff* will pay all costs that may be awarded to the defendant and all damages he may sustain by reason of the wrongful suing out of the attachment, not exceeding," etc. The trouble arises from the fact that it is not a joint undertaking where all parties to the instrument are obligated to pay in the first instance. The obligation assumed by the statute is that the plaintiff shall pay; hence, the liability of the sureties is secondary, and only attaches upon an award against the principal and a failure to pay.

The question appears to be more one of practice of expediency, than of legal substance. True, it is an undertaking on the part of the sureties that the principal shall perform, and their liability is contingent upon such performance; but whether the principal is sued alone in the first instance, and judgment obtained against him, and he failing to pay, a second suit is instituted against the sureties, or all are joined in the same suit, the legal liability would remain the same, and the sureties would, in either instance, only be held to the performance of the obligation assumed in the bond. If all are sued jointly and a judgment obtained against all, it would still be the debt of the principal, and if paid by him, the sureties would be released. If he failed to pay, the sureties would only be held to their undertaking that the payment should be made. Prior to the adoption of codes, at the common law, there were two well defined lines of decision upon the same and analogous statutes. In Ohio, *Bruce v. Coleman*, 1 Handy, 515; Alabama, *Herndon v. Forney*, 4 Ala. 243; Illinois, *Churchill v. Abraham*, 22 Ill. 455; Tennessee, *Jennings v. Joiner*, 1 Colo. 695; Virginia, *Dickinson v. McGraw*, 4 Rand. 158, where it was held that the parties could be joined and suit brought against all in the first instance. In Georgia, Mississippi and some other states the opposite doctrine was held.

In an early case under the common law practice, in this

state, then territory, *The Sterling City Mining Co. v. Cock et al.*, 2 Colo. 24, it was held that suit must first be brought against the principal and a judgment obtained before proceedings could be maintained against the sureties. As far as I can ascertain, this is the only authoritative decision in this state upon the question, and, although it was warranted by a long line of common law decisions, might with equal propriety have been decided the other way. Under our modern practice, modifying and simplifying proceedings, it is very doubtful whether the decision should be followed. It may have been, and seems, to a certain extent, to have been based upon the technical distinctions existing at common law in regard to the form of the action necessary. Upon such an undertaking the only action was debt, and that form of action could only be maintained when the amount was liquidated, rested *in numero*, and such being the law and practice, the sureties upon the bond could not be joined with their principal in a suit to liquidate the amount of the damage sustained, and that, though technical, seems to be the only well founded basis upon which the cases were determined. With all forms of action abolished as in modern practice, there seems, in reason, no foundation for the distinction. As before stated, the legal status and liability of the sureties is in no manner changed. Public policy would dictate, where no legal objection exists, that multiplicity of suits, circuitry of action, and double costs should be avoided. It certainly would be as much in the interest of the sureties as of the plaintiff. The participation of the sureties in the liquidation of damages against the principal might greatly inure to their benefit, reducing the amount of their liability in cases where by reason of the insolvency of the principal, or from other causes, he might fail to properly defend. I can find no good legal reason why the parties, principal and sureties, should not be joined in an original action. While there are many cogent reasons why they should, there is no statute forbidding it, and to allow it to be done, would not only greatly simplify and facilitate pro-

ceedings and save cost and trouble, but would also be more in harmony with the present system of adjudication. Modern decisions, since the adoption of codes, seem to regard it as the proper course.

In 1 Wade on Attach. §§ 297, 298, the author, after reviewing the authorities, concludes: "So the sureties and principal obligor, whether the latter be the attaching plaintiff or not, may be joined as defendants in the action on the bond."

In Waple on Attach., chap. 14, p. 446: "The general practice does not require that, prior to a suit on the bond against all the obligors, there first must be judgment obtained against the principal in a separate action."

And in Drake on Attach. § 166: "The question is here presented, whether in order to maintain an action on the bond, the damages must be first recovered in a distinct action? This is believed not to be requisite."

At the time of the decision of *Sterling Mining Co. v. Cock*, *supra*, under common law practice, as has been shown, the courts of many, if not a majority, of the states held the action maintainable. Since that time, under the code abolishing all technical forms of action, it would seem clearly advisable and in the interest of all parties that the rule in this state should be changed and the whole matter adjudicated in one proceeding; and while the court was justified in following the precedent, the judgment will be reversed and cause remanded for trial.

Reversed.

THE DENVER & RIO GRANDE RAILWAY CO., APPELLANT,
v. DAVIDSON, APPELLEE.

SAME, APPELLANT, v. BAKER, APPELLEE.

CONSTITUTIONAL LAW.

The statute in relation to the liability of railroad companies for killing stock, (Mills Ann. Stats. secs. 3712, 3713.) is unconstitutional. The D. & R. G. Ry. Co. v. Outcalt, followed.

Appeals from the County Courts of Gunnison and Delta Counties.

Messrs. WOLCOTT & VAILE, GOUDY & SHERMAN and Mr. JOHN KINKAID, for appellants.

No appearance for appellees.

PER CURIAM. These two cases involve the same question presented in *Denver & Rio Grande Railway Co. v. Outcalt*, (ante p. 395) decided at the present term, viz. the constitutionality of sections 3712, 3713, pp. 1979-80, Mills Ann. Stat. in regard to the killing of stock by railroad engines and trains, and the statute in that case having been declared unconstitutional, these cases must follow the decision in that.

The judgment in each will be reversed and the cause remanded.

Reversed.

TANNER, APPELLANT, v. HYDE, APPELLEE.

1. PARTNER, AUTHORITY OF.

A member of a non-trading firm cannot, without express authority, bind his copartner by the execution of a note unless it is necessary to the transaction of the partnership business, or there be a custom in that class of business from which the law implies such authority.

2. SAME—BURDEN OF PROOF.

The burden of proving whatever is essential to give rise to the liability in such a case rests upon the party who brings the action.

Appeal from the District Court of Montrose County.

Mr. A. MACON, for appellant.

Messrs. GOUDY & SHERMAN, for appellee.

BISSELL, J., delivered the opinion of the court.

The present controversy is very easily settled by the application of the familiar doctrine which limits the implied power of the members of non-commercial partnerships to execute commercial paper. In 1886, one Jones and the appellant Tanner appear to have been concerned in running and operating a farm in Montrose county in this state. The testimony establishing the joint relation of the parties was furnished by some letters written by the appellant Tanner, and the evidence of Jones who executed the paper. Generally speaking, it may be said that Jones and Tanner agreed to work, manage and cultivate the land for their joint benefit. The work was to be done by Jones at an agreed valuation for his labor, and the funds were to be advanced by Tanner. There were some other minor details contained in the agreement, but these are all that are essential to show the character of the copartnership, and the relation sustained by the parties to each other. While they were engaged in carrying out this undertaking Jones and one Kerr bought a binder and harvester for the joint use of these three parties. When Jones bought the machine he bought it on credit, and gave two notes for one hundred and two dollars and eighty cents each, due the first of the following January to the order of W. H. Hyde, and delivered them to the vendor. The notes were signed in the individual names of Jones, Tanner and Kerr. Jones and Kerr signed their own names and Jones affixed Tanner's signature to the two bills. The

notes were not paid at maturity and the present suit was brought against Tanner to collect them. Tanner defended, denied the execution of the notes, and averred that Jones was without authority to execute them on his behalf. The court held his defense unavailing. Under the evidence this finding was manifestly wrong. Nothing is more clearly settled in the law than that one partner in a non-trading partnership cannot bind his partner by a note unless he has express authority to execute it, or the execution is necessary to the transaction of the partnership business, or there be proof of some custom in that class of trading from which the law implies the authority. The burden to prove what is essential to give rise to the liability rests on the party who brings the suit. Lindley on Partnership, (fourth edition), vol. 1, p. *267; *Deardorf Adm. v. Thatcher et al.*, 78 Mo. 128.

The plaintiff sought to avoid the effect of this rule, and offered testimony which in some very slight fashion tended to prove that some notes which had been executed by Jones in the name of the concern were afterwards paid by Tanner. There was, however, an entire absence of evidence that the copartner had express authority to sign the paper in suit, or that the giving of the note was essential to the transaction of the business of the parties, or that it was usual in such undertakings to execute commercial bills. There is nothing in the record which would in any way tend to bring the case within the limit of any established exception to the general rule stated. Under these circumstances it must be held that Tanner was not bound by the affixing of his name to these notes by his partner Jones.

For the foregoing reasons and the error committed in the entry of judgment against the appellant Tanner, this case must be reversed and remanded for a new trial in conformity with this opinion.

Reversed.

BREWSTER, APPELLANT, v. CROSSLAND, APPELLEE.**1. PLEADINGS AND PROOF.**

The allegations and proofs must correspond.

2. PRACTICE—INSTRUCTIONS.

A failure to recognize an exception to a general rule stated in an instruction cannot be relied on as error unless the evidence tends to make a case within the exception.

3. SAME.

An assignment of error cannot be predicated upon an instruction, to the giving of which no objection appears to have been made.

Appeal from the District Court of Fremont County.

Messrs. MACON & MACON, for appellant.

Messrs. BENTLEY & EDMONDS, for appellee.

BISSELL, J., delivered the opinion of the court.

Mrs. Elizabeth Crossland traded horses with one Ralph Brewster. Mrs. Crossland owned "Daisy" and Brewster owned "Tim." The exchange was made early in 1889 at Mrs. Crossland's house. It proved very unsatisfactory to the Madam, who subsequently brought suit to recover her horse or its value, with damages for its detention. Within a reasonable time after the transaction, Mrs. Crossland attempted to rescind the contract, and did whatever was necessary to initiate her rights if she were entitled to rescind. The suit was founded on the deceit practiced by Brewster in making the barter, and in the complaint it was charged that Brewster made sundry and divers false and fraudulent representations on which the plaintiff relied to her damage. The defense may be said to tender the general issue in every particular save as to its admissions. Brewster admitted that he represented his horse "Tim." "to be gentle, tractable and manageable and suitable for a lady to drive, and he averred

that the horse was just such an animal as he represented it to be," reasserting what were alleged to be his statements as to the qualities of the animal and on which it was charged Mrs. Crossland relied. He denied that they were false or made with intent to cheat. It will be observed that there is nothing in the admission which amounts to an averment that the representations were made because Brewster believed them to be true, and that he had obtained his information concerning the animal from a source on which he had a right to rely. This is important with reference to one of the errors which the appellant assigns. The case was tried to a jury. The verdict was against Brewster, judgment was entered, and he appeals.

But three errors are insisted on to reverse the judgment. As is usual in most appeals it is asserted that the judgment is unsupported by the evidence. With this question we have no concern. The judgment rests on the verdict of a jury. This must be taken as conclusive on the question of fact, unless it is brought within some of the exceptions which the adjudications of the supreme court recognized as sufficient to warrant an appellate tribunal to disturb the verdict. None of the exceptions exist in this case. The finding is a decisive determination of the falsity of the representations, and the sufficiency of the proof to entitle the plaintiff to recover.

During the progress of the trial, and when the plaintiff was recalled for the purpose of giving rebuttal testimony she gave evidence tending to show that at the time of the trade Brewster stated that if it should turn out that what he had said concerning his animal was not true, and Tim did not prove to be the gentle, tractable beast he was represented to be, he would at any time consent to annul the trade and return the horse which he had received in exchange. No objection was interposed to the introduction of this testimony, but on cross-examination it transpired that this statement was made while he was leading Mrs. Crossland's horse out to the wagon to hitch him, and after Tim had been put in

the stable. The defendant then moved to strike out that testimony, but assigned no ground as the basis of his motion. It is argued here that it was error to admit the testimony, since it was clearly evident that this statement was made subsequent to the substantial completion of the transaction, and after the title to the respective horses would by the law be assumed to have passed. In one aspect of the case there would be considerable force in the objection. It is quite possible that if the defendant had asked an instruction directing the jury to consider this evidence solely with reference to its bearing upon the question of the intent, and the court had refused to give it, error might have been laid. It cannot be held however that it was error for the court to deny the motion to strike it out, since clearly the testimony tended to show that the defendant made the representations which he did concerning the qualities of the animal with the intent to have the plaintiff act on the strength of what was said. What its collateral effect may have been upon the deliberations of the jury it would not be easy to estimate, but the defendant's only remedy, if he desired to escape what he now asserts was its baleful influence, lay in a request to the court to charge the jury on that subject. Failing in this it is not such an error as would necessitate the reversal of the case, for it cannot be seen that it worked to the defendant's prejudice.

The principal objection urged, and on which a very learned and able argument has been made by counsel for the appellant, is laid on the instruction which the court gave to the jury concerning the representations. The court charged the jury generally in accordance with the law which governs actions for deceit. The instruction failed to contain one limitation which under some circumstances operates to bar the recovery. It is not every false statement or misrepresentation made with the intent that the other person should rely upon it, and on which that party acts to his prejudice and damage, which will warrant a recovery. It is often true that a false statement, positively made, is uttered in the be-

lief that the statement is true, and that belief is based on information which would justify it. As counsel accurately contend, this principle is as well ingrafted on the law of fraud as any other, and it must always be recognized in a proper case, and any neglect on the part of the court to state the exception where the evidence renders it necessary, and where the question is properly preserved, must undoubtedly be error. This concession will not lead to the reversal of the present case. There are many sufficient answers to the contention. In the first place, if a party intends to rely on his belief in the truthfulness of his representations, and to justify their making by proof of the grounds of his belief, it is incumbent on him under our system of pleading to defend on that basis. He cannot be permitted to admit the making of the representations, assert them to be true, and then in his proof seek to justify because he believed them to be true, and offer proof of a basis which legally justifies that belief. The admission that the representations were made and the reaffirmation of their truth are inconsistent and incompatible with evidence of the description. Under these circumstances he should not be permitted to introduce such testimony. Whatever may be the rule of pleading on this subject the defendant cannot insist upon this point in the present case, since he failed to offer to make the proof which he now says requires the statement of the exception in the instruction.

A more conclusive answer to the contention, if the thing be possible, is found in the fact that the record fails to disclose that counsel made any objection to the instruction. *Wray v. Carpenter*, 16 Colo. 271; *D. & R. G. R. R. Co. v. Ryan*, 17 Colo. 98.

Under these circumstances no valid assignment of error can be predicated on the giving of the instruction.

These considerations dispose of all the objections urged in the argument which are needful to be considered, and since the alleged errors are without foundation, the judgment of the court below must be affirmed.

Affirmed.

FARRIS, PLAINTIFF IN ERROR, v. WALTER ET AL.,
DEFENDANTS IN ERROR.

2	450
19c	849
2	450
12	515

1. SUMMONS—DEFECTIVE.

Summons which fails to comply with the provision of the Code of 1889, which provides that it shall briefly state the sum of money or other relief demanded in the action, is fatally defective, and motion to quash should be sustained.

2. SAME—APPEARANCE.

Defendant was not required to appear and answer the complaint in obedience to a second summons while his motion to quash the first was pending.

Error to the District Court of Arapahoe County.

Mr. T. J. O'DONNELL, for plaintiff in error.

Messrs. DOUD & FOWLER, for defendants in error.

RICHMOND, P. J., delivered the opinion of the court.

This is an action to recover upon a promissory note. The action was commenced by the issuance of the following summons :—

“ You are hereby required to appear in an action brought against you by the above named plaintiff, in the district court of Arapahoe county, state of Colorado, and to answer the complaint therein within twenty days after service hereof, if served within this county, or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service, or judgment by default will be taken against you according to the prayer of the complaint, a copy of which is served herewith.

“ If a copy of said complaint is not served herewith, or if service hereof be made outside this state, you are by law allowed ten days additional to the time above specified in which to appear and answer.

“As will more fully appear from the complaint in said action, to which reference is here made.

“Given under our hands at Denver, in said county, this first day of November, A. D. 1889.”

Defendant specially appeared and filed a motion to quash upon the alleged ground that the said summons is insufficient and void and not in conformity with the statute in such cases made and provided, in this, that it did not briefly or otherwise state the sum of money or other relief demanded in the action.

Thereafter the plaintiff issued a second summons, the concluding part of which is, “the relief demanded in said action briefly stated is, to wit, to recover of said defendant the sum of \$589.20, as will more fully appear from the complaint in said action to which reference is here made.” Due return of the service of this summons was made, showing that it was served upon the defendant, Farris, on the 30th day of November, A. D. 1889, together with a copy of the complaint.

The second summons so issued and returned was not attacked, nor was any appearance made on the part of the defendant in obedience to that summons. The record discloses further that the motion to quash the first summons was made on the 22d of November, 1889, and taken under advisement by the court; that on the 20th day of January, 1889, motion was denied, and that on the same day default and final judgment was entered against defendant.

The contention of plaintiff in error is that he specially appeared in obedience to the first summons and interposed his motion to quash, and that while that summons was alive no second summons could be issued.

Defendant in error insists that he had a right to issue the second summons, and that after the time had expired in which the defendant should plead after the service of this second summons, default was entered and judgment rendered.

Neither the original nor the supplemental record advises us which summons the court recognized, but the recitations in the record warrant us in saying that the court deemed the first summons sufficient, as was indicated by its action in de-

nying the motion to quash and entering judgment on the same day. The ground of the motion that the first summons did not state the amount of the relief demanded was well taken. The action in this case was commenced in November, 1889, consequently the summons should have been in conformity with the provisions of the Code of 1889, approved April 19, 1889, Session Laws 1889, page 71. This section provides that the summons shall state the parties to the action, the state, county and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after service of summons * * * and shall briefly state the *sum of money* or other relief demanded in the action.

The first summons undoubtedly fails to comply with this provision of the code. The omission was fatal and the court should have sustained the motion to quash: *Smith et al. v. Aurich et al.*, 6 Colo. 388; *A. T. & S. F. R. Co. v. Nicholls*, 8 Colo. 189.

Let it be understood that the motion to quash the first summons was pending when the second summons was issued; that the defect in the first summons was not confessed by counsel for plaintiff; that no leave of court was granted to issue the second summons and the judgment was entered on the same day the motion to quash the first summons was denied. The second summons cured the defect in the first and was in conformity with the provisions of the code as it then existed, but the query arises, was the defendant obliged to recognize or appear in response to this summons before some action had been taken by the court with reference to the first. Would he have been warranted in believing that the court could, when it denied his motion to quash the first summons, immediately proceed to enter judgment of default and final judgment, basing such action upon the second, without giving the defendant an opportunity to appear in obedience to that summons? If the first was sufficient, and the court so held in denying the motion, certainly it was the duty of the defendant to appear immediately upon the action of the court in overruling the motion. The court had

no right to compute the time against the defendant wherein he should appear to answer or demur to the complaint while this motion was pending in the court. The court could not have entered a default pending the motion, and the defendant was certainly entitled to time to answer or demur to the complaint, or to take such other action as he deemed proper, before default and final judgment should have been entered.

We are utterly unable to find satisfactory reasons which authorize us to say that the defendant in this case was under any obligation to appear and answer the complaint in obedience to the second summons, while his motion to quash was pending, and without any action or admission on the part of the plaintiff or the court indicating the necessity therefor. If at the time of the filing of the motion to quash, plaintiff had confessed the motion and issued an alias summons, or, if at any subsequent time he had appeared and confessed the defect in the first summons and defendant had failed to respond to the second summons, then the default and final judgment could have been legally entered.

An alias writ is one which is issued when a former writ has not produced its effect. The writ is so called from the words, "*as we have formerly commanded you,*" being inserted after the usual commencement, "*we command you.*" Rapalje and Lawrence's Dict.

In the case of *Barndollar et al. v. Patton*, 5 Colo. 47, it was held that where the writ was fatally defective, or had been issued without authority, or for any other reason it is incapable of effectuating its purpose, and for such reason is quashed or otherwise fails in performing its office, it is manifest that another writ is necessary. In that case the court held that an alias writ could issue where the first writ had proven defective and had been quashed upon motion. Such is not the condition of affairs in the case at bar. The first summons, although defective was held to be a good and valid writ; consequently the necessity for issuing an alias writ and the right to exercise the statutory privilege did not exist.

The judgment must be reversed.

Reversed.

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417	428

WOOLMAN, APPELLANT, v. THE CAPITAL NATIONAL BANK,
APPELLEE.

1. PRACTICE—REPLICATION.

A replication is not necessary to an answer which puts in issue the ownership of the note sued upon, and contains new matter which is not defensive.

2. SET-OFF.

Demands to be set off must be mutual, between the parties to the action.

Appeal from the County Court of Sedgwick County.

Mr. J. B. SWEET, for appellant.

Mr. ALBERT SMITH, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

This was an action upon a promissory note. On the 5th of August, 1889, The Capital National Bank filed its complaint in the county court of Sedgwick county, alleging that H. M. Woolman did on the 19th day of June, 1888, make and deliver to Stark & Mosher his certain promissory note in writing.

That for a valuable consideration Stark & Mosher indorsed said note, without recourse to the plaintiff.

That it is the rightful owner and holder of said note. And that there is due the plaintiff on said note the sum of \$435, with interest at ten per cent per annum from the 19th day of June, 1888. Prayer for judgment and verification.

To the complaint the defendant, Woolman, appellant herein, filed two defenses, but subsequently elected, upon direction of the court, to stand by the second defense.

By the second defense it is admitted that he executed and delivered the note described in the complaint to one E. W. Mosher, and further he alleges that The Capital National

Bank was not at the time of bringing this action, and never has been the owner of said note, and that it has no interest in the subject-matter in controversy, but that said Capital National Bank has conspired with the aforesaid E. W. Mosher and has brought this suit for the purpose of preventing the defendant from bringing a set-off against the said E. W. Mosher, to which this defendant is justly entitled. And that for said purpose the said Capital National Bank falsely maintains title to said note mentioned in the complaint.

No replication was filed to this defense. Thereafter the defendant moved for judgment upon the pleadings, which was denied. Subsequently a judgment was rendered in favor of plaintiff for the amount of the note, interest and costs of suit. Whether the judgment was rendered upon a verdict or finding of the court the record fails to disclose.

The sole contention of the appellant is that the court erred in not rendering judgment for defendant, because the plaintiff had failed to reply to the alleged new matter set up in the answer. We cannot concur in this view.

By the complaint it is alleged that the note was payable to Stark & Mosher, and by them indorsed without recourse for a valuable consideration to The Capital National Bank. That such a note was made and delivered by the defendant is admitted in the answer. The ownership of the note is directly put in issue by the answer, to which no replication was necessary. The new matter, to which appellant claims there should have been a reply, is the alleged conspiracy of the bank with Mosher for the purpose of preventing the defendant from bringing in a set-off against Mosher. What the character of the set-off was we are not advised, but we are certainly informed that it was an individual claim against Mosher, which the defendant sought to set up against a note made to Mosher & Stark and by Mosher & Stark, as is alleged in the complaint, transferred to The Capital National Bank.

If the action had been brought by Mosher & Stark against the defendant, Woolman, such a defense and set-off

could not have been interposed. The universal rule is that debts set off must be mutual between the parties to the record. Therefore, in an action to recover a debt due a partnership, a debt due from one copartner cannot be set off. *Gregg v. James*, 12 Amer. Dec. 151 (Breese Ill. Rep. 143). Joint debts cannot be set off against separate debts, nor separate against joint, because in such cases the parties are not the same. *Ib.* 153.

In *Burgwin et al. v. Babcock et al.*, 11 Ill. 28, it was held that, "A separate demand cannot be set off against a joint demand, nor can a joint debt be set off against a separate debt. The demands to be set off must be mutual between the parties to the action. See, also, *Warden & Co. v. Newdigate*, 52 Amer. Dec. 567, and cases cited (11 B. Munroe, 174). *Waterman on Set-off*, par. 234; *Davidson v. Remington*, 12 How. Pr. 310.

It is true there is an exception to this rule, but there is nothing in the answer which brings the defendant within the exception, and if this rule did not obtain we still think that the judgment should be affirmed.

The judgment must be affirmed.

Affirmed.

JACOBS ET AL., APPELLANTS, v. MITCHELL, APPELLEE.

1. EVIDENCE.

In an action by the assignee of certain claims, evidence offered by defendants under the general issue, to prove that a third person furnished the money with which the claims were purchased was properly rejected.

2. PRACTICE—INSTRUCTIONS.

Objections to instructions should be made in such time and manner as to give the trial court an opportunity to correct the same, if found erroneous. General exceptions to instructions "in each and every part thereof" are insufficient.

3. SAME.

Oral instructions are within the above rule.

Appeal from the District Court of Pitkin County.

Mr. W. W. COOLEY & Mr. A. HEIMS, for appellants.

Mr. C. R. BELL & Mr. D. J. HAYNES, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

Plaintiff, Mitchell, brought this action for the purpose of recovering the sum of \$302.50, alleged to be due upon three different claims against the defendants, which were assigned for a valuable consideration to him. Three causes of action are enumerated in the complaint to which demurrers were interposed and overruled. Thereupon the defendants, Jacobs, Wilder, Bowles and Mason answered by general denial. Default was entered as to McMichael.

The cause was tried to a jury and resulted in a judgment for the amount claimed with interest. Defendants seek to reverse this judgment on this appeal and assign several errors.

At the trial defendants sought to prove, under the general issue, that one Mackey furnished the funds to purchase the claims sued upon. This evidence was properly rejected by the court as immaterial and incompetent.

Conceding that Mr. Mackey furnished the money for the purpose of purchasing the claims, it does not follow that the plaintiff was not the *bona fide* purchaser, the legal assignee of the claims declared upon, and real party in interest.

The next alleged error is in the instructions delivered by the court.

The record discloses that the defendants excepted to the instructions generally in the following language: "Defendants except to the instructions in each and every part thereof."

It is a well settled rule of the supreme court of this state that general exceptions taken in this way are not sufficient, since it is evident that they do not point out any specific objection, so as to afford the trial court an opportunity for reviewing and correcting the charge, if found erroneous. *Edwards v. Smith*, 16 Colo. 529.

This brings us to the last and only question: Did the court err in delivering the instructions orally without consent of the defendants? No exceptions were taken to the delivering of instructions in this manner prior to the motion for a new trial, and we do not think that the defendants are in a position to now insist that the verdict and judgment which was manifestly correct should be reversed. If the objection to the giving of the instructions orally had been interposed at a time when the court could have acted upon it, our conclusion would be different. It has been held by the supreme court that objections to instructions should be made in such time and manner as to give the trial court an opportunity to correct the same if found erroneous. * * *

"Any other rule would enable a party to sit silently by, knowing that some error had been committed against his interest, of which perhaps no other person was aware at the time, and thus take the chances of a verdict in his favor, while having the sure means of setting aside the verdict if it happened to be against him. The law in this jurisdiction never has permitted, and it is to be hoped that it never will permit, such experiments with judicial proceedings. There will always be enough important questions to review in the appellate courts if parties are required to be vigilant to prevent error in the trial courts." *D. & R. G. R. Co. v. Ryan*, 17 Colo. 98; *Wray v. Carpenter*, 16 Colo. 271.

The fact that counsel did not prepare and request any instructions, and allowed the court to instruct the jury orally without objection, brings them within the above rule, and the court had a right to assume that counsel would not invoke the statutory requirements for the purpose of reversing the judgment if unfavorable to them.

We see no error that would warrant a reversal of this judgment, consequently it must be affirmed.

Affirmed.

HELLER, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE
STATE OF COLORADO, DEFENDANTS IN ERROR.

1. PRACTICE IN CRIMINAL CASES.

An objection that the offenses charged in the indictment are improperly joined will not be considered, upon error, when it appears that before the trial a *nolle prosequi* had been entered as to the count claimed to have been improperly joined, and that no evidence was admitted under it at the trial, or reference made to it by the court.

2. CONSTITUTIONAL LAW—TITLE OF ACT.

An act entitled "An Act to amend chapter 24 of the General Laws of Colorado, entitled Criminal Code," complies with the provision of the constitution (art. 5, sec. 21) that a bill shall contain but one subject, which shall be clearly expressed in its title.

3. SAME.

An act so entitled is not repugnant to the constitution on the ground that it extends the operation of the statute to persons and transactions not theretofore included.

4. SAME.

Whenever the matter contained in a statute may fairly be considered germane to the subject expressed by its title, it is sufficient.

5. INDICTMENT, WHEN SUFFICIENT.

An indictment stating the fact constituting the crime of embezzlement, but not designating the accused as bailee, trustee or agent, is sufficient.

6. SAME.

It is not necessary in an indictment for embezzlement of a promissory note, to describe the note with particularity.

7. PRACTICE IN CRIMINAL CASES—LIST OF JURORS.

The statute providing that previous to arraignment of a defendant for a felony, he shall be furnished with a copy of the indictment and a list of the jurors and witnesses, does not require that such be furnished at any subsequent time.

8. PRACTICE IN CRIMINAL CASES.

A defendant who has gone to trial without objection, cannot by motion in arrest of judgment, obtain his discharge on the ground that he was not tried on or before the second term of court after he was committed.

Error to the District Court of Arapahoe County.

Messrs. DECKER & O'DONNELL and Messrs. OSBORNE & TAYLOR, for plaintiff in error.

Mr. J. H. MAUPIN, attorney general, and Mr. H. B. BAAB, for defendants in error.

RICHMOND, P. J., delivered the opinion of the court.

Plaintiff in error, David Heller, was at the January term, 1890, of the district court for Arapahoe county, indicted by the grand jury. The indictment presented contained four counts. The first count charged him with embezzlement, as the agent of Caroline Spindler, of a promissory note of the value of \$1,200, the property of said Caroline Spindler. The second count charged him with embezzlement as bailee of the same note. The third count charged him with obtaining the possession by false pretenses of the same note, of the value of \$1,200. The fourth count charged him with the larceny of \$1,200, the property of Caroline Spindler, received by him as bailee of said Caroline Spindler.

A *nolle prosequi* was entered as to the third count.

At the April term, A. D. 1890, of said district court, plaintiff was formally arraigned and pleaded not guilty. Final trial was had at the January term, 1891, and resulted in a general verdict of guilty.

The value of the property was found to be \$1,000.

Exceptions to the verdict were entered and motion for a new trial made.

February, 1891, motion for the discharge of the defendant was interposed on the ground that the cause had been continued for a period of two terms at the instance of the people, and that by virtue of the provisions of section 1616 of the General Statutes of this state, defendant was entitled to his liberty. This motion was overruled as well as the motion for a new trial.

The motion for a new trial was based upon the alleged errors of the court in the admission and rejection of testi-

mony, misconduct of the jury, and new evidence, alleged to have been discovered since the trial. Motion for a new trial was denied and judgment rendered. Motion interposed in arrest of judgment, overruled.

Thereupon the court entered judgment upon the verdict, on the first count of the indictment, sentencing the defendant to one year in the penitentiary. To reverse this judgment defendant prosecutes this writ of error, and in support thereof assigns seventy alleged errors. These can properly be aggregated under five heads:

1. Misjoinder of counts in the indictment.
2. Error in the form of the verdict in this, that the verdict was general on three counts in the indictment, and should have been special, and designated the count upon which the verdict was based.
3. The constitutionality of the statute defining the crime enumerated in the first count of the indictment.
4. Errors occurring at the trial, to wit, errors of the court in the admission of testimony over the objection of the defendant, in the rejection of testimony and in the instructions to the jury.
5. Error of the court in overruling motion for a new trial.

It is insisted that the indictment is defective in this, that it contained counts charging offenses against the law wherein the character of the punishment attached to the offense was different, that is, that for the offense charged in the first, second and fourth counts, the punishment was confinement in the penitentiary for not less than one nor more than ten years, while the punishment for the offense charged in the third count is a fine not exceeding \$1,000 and imprisonment in the penitentiary not exceeding one year and a return of the property fraudulently obtained.

It is admitted by counsel for defendant that different counts for similar offenses may properly appear in the same indictment, and the test by which to determine whether they can be united is the character of the punishment attached to each offense charged. It is also admitted that the punish-

ment for ~~the~~ offenses charged in the first, second and fourth count is the same. This admission, coupled with the fact that the prosecution entered a *nolle prosequi* as to the third count in the indictment at a former term of the court, and that no testimony was offered under said count, nor was it referred to, either by the court or counsel, during the progress of the last trial now under consideration, disposes of this contention.

True, the court in its instructions did not call the attention of the jury to the fact that the third count had been nollied and judgment rendered thereon for defendant; still a careful reading of the instructions will disclose the fact to be that they were addressed particularly to the first count in the indictment, and the counsel admit this in their brief in the following language: "As the court in its instructions directs the attention of the jury more particularly to the offense charged in the first count of the indictment and the sentence and judgment of the court is upon that count." Being no part of the indictment at the trial now under review, we are unable to conceive how it could have been considered by the jury.

The next point to which our attention is called is the fact that the indictment is drawn under an act of the legislature entitled An Act to amend chapter 24 of the General Laws of Colorado, entitled "Criminal Code."

It is insisted that at the time this statute was enacted there was no act of the legislature entitled "Criminal Code," that the only general act known to our statute was an act relating to criminal offenses entitled An Act concerning "Criminal Jurisprudence," and that the title of an act is by the constitution made an indispensable part of every enactment by the legislature. And that the compiler of laws cannot be delegated with authority to change the title of a statute. The act referred to—page 69, Session Laws of 1881—is entitled An Act to amend chapter 24 of the General Laws of the state of Colorado, entitled "Criminal Code." The second section of the act reads as follows:

“If any clerk, apprentice or servant, whether bound or hired, or any agent, clerk, or employee, to whom any money, bank bill, note, goods or chattels, shall be intrusted or delivered by any other person for the benefit or use of his or her master or mistress, principal or employer, or come into the hands of such clerk, apprentice, servant, agent or employee, by virtue of his or her employment or confidential relation to his or her master, mistress, principal or employer, shall withdraw himself or herself from his or her master, mistress, principal or employer, or go away with the said money, bank bill, note, goods or chattels, or any part thereof, with the intent to steal the same, or defraud his or her master, mistress, principal or employer thereof, contrary to the trust and confidence in him or her reposed by his or her said master, mistress, principal or employer, shall embezzle the said money, bank bill, note, goods or chattels, or any part thereof, or otherwise convert the same to his or her own use with like purpose to steal the same; every such person so offending shall be deemed guilty of larceny and be punished accordingly.”

The laws of 1877 were compiled by the secretary of state under authority conferred upon him by the legislative assembly of this state, in which it was provided that the secretary of state should prepare or cause to be prepared and printed all the general laws passed by the general assembly now in force and not repealed by this general assembly, and *to arrange the same in a concise and compact form so as to have all law upon each subject arranged together under the same title as far as practicable, and that the laws shall be divided by appropriate titles with the date of approval printed at the end of each act.*

By virtue of the provisions of this act the secretary of state compiled the laws relating to crime under the head of “Criminal Code.” Chapter 23 of the Revised Statutes, 1868, is entitled “Criminal Code,” and embraced, or should have, under its head every provision of law pertaining to criminal jurisprudence. This title was continued in the

compilation made by the secretary of state under the act above referred to. And chapter 22 of the territorial act 1868 is embraced in chapter 24 of the Acts of 1877. By the constitution all territorial laws not inconsistent with its provisions were continued in full force. *Vide* Schedule, § 1. The act of 1881, then entitled An Act to amend chapter 24 of the general laws of the state of Colorado, entitled "Criminal Code," in our judgment fully complies with article 5, section 21, of the constitution, both in letter and spirit. And we are further of the opinion that the caption "Criminal Code" is broad enough to embrace every offense against the law that can be classified as a misdemeanor or felony as well as criminal pleading and practice.

In *Clare v. The People*, 9 Colo. 122, it is said that the provision of the constitution referred to had, among other purposes, the purpose to prevent imposition upon the legislature and the people through the pernicious practice of dealing in bills, the subject of which the titles give no intimation, and that this constitutional inhibition must receive a reasonable interpretation, and whenever a matter contained in the statute may fairly be considered germane to the subject expressed by the title, it is sufficient. *Dallas v. Redman*, 10 Colo. 300; *Edwards v. D. & R. G. R. Co.*, 13 Colo. 59.

It is further contended that the act of 1881 was an act to amend chapter 24, and under such title the legislature was inhibited by the constitution from creating a further and additional crime then unknown to the statutes. In other words, that the act of 1881 should have been more explicit and should have provided, not only for the repeal of the section, but should have provided by title for the creation of another and different offense not then designated in chapter 24. It will be observed that the act of 1881 deals with various sections of chapter 24, and provides that the foregoing shall stand in lieu of said section 67.

We are unable to appreciate the force of the argument of counsel upon this point. Certainly the act of 1881 cannot

be classified as anything more than an amendment of various sections of chapter 24.

The constitution of this state, by section 23, article 5, provides that no law shall be revived or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.

The legislature, therefore, in amending the various sections enumerated in the act of 1881, followed strictly this provision of the constitution and extended the operation of section 67, by making it applicable to an agent or employee. The mere fact that the legislature used the word "repealed" does not destroy the effect, because of the language preceding and following, that is, an act to amend chapter 24 of the criminal code, and that section 67 thereof shall read as follows and the section enacted should stand in lieu thereof.

We know of no provision of the constitution that inhibits the legislature from extending the operation of the section of the statute thus amended. On the contrary, we are inclined to think that the language of section 23, article 5, clearly contemplated that such power should be vested in the legislature, and that the provisions of a statute or section thereof may be extended in its operations by amendment to cover other persons or transactions, providing such persons and transactions embraced within the extension by way of amendment come within the purview of or are germane to the purposes and objects of the statute.

This section of the constitution has received the consideration of the supreme court of this state in the case of *Edwards v. D. & R. C. R. Co.*, *supra*, in which it was held that if the subject considered in the body of the statute be germane to the general subject expressed in the title, the constitution is in this respect complied with. And in that case the court took occasion to say: The statute challenged as void by virtue of conflict with the constitutional provision now under consideration, in effect adds a section to the chapter mentioned by its title. It is properly termed an amendment,

because, as we have seen, it deals with a matter germane to the general subject of the chapter. Yet it in no way changes any section or other specific portion of the act relating to the formation of domestic corporations for pecuniary gain. It introduces a requirement wholly new to the act, in so far as it pertains to this class of corporations. It is complete in itself, covering all there is in the chapter as amended. * * *. It enacts and publishes at length so much of the act as it treats of. It can result in no ambiguity or uncertainty, nor could any legislator have been misled or deceived as to its purpose and effect. See *Callahan v. Jennings*, 16 Colo. 472.

The manner of thus amending the chapter by enacting a section in lieu of a section repealed, is approved by the opinion in that case. The act refers to the criminal code, it repeals certain sections of the criminal code, and it extends the operation of section 67 by making an agent or employee amenable to law as a clerk, apprentice or servant was before.

The title of the original act or chapter was thus fully and correctly recited, and the specific sections as amended were re-enacted at length. They contained no object not embraced in the title of the original act, and we think that the title of that act in form is in substantial accordance with the clause of the constitution which defines the legislative power on the subject to which the act relates, and indicates the purpose to be attained by the legislature.

In the case of *The People v. Mahaney*, 13 Mich. 481, Judge Cooley, in delivering the opinion, comments upon this constitutional provision as follows: "This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was

only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

In *Underwood v. McDuffee*, 15 Mich. 361, Campbell, J., in rendering the opinion, commenting upon the same section, says: "It is also urged that the statute creating the existing system of references is invalid as not in any proper sense an amendment of the prior statutes, although purporting to be such. The constitution declares that no law shall be amended or altered by reference to its title only, but that the sections altered or amended 'shall be re-enacted and published at length.' The law in question was designed to remodel the entire system of references; and in lieu of several sections of the former statutes, a series of new sections was adopted, each in the room of an old one. The objection pointed out is, that some of the new sections bear no resemblance to those superseded, but relate to a different class of details. We can see no illegality in this. There is no principle which can prevent the legislature from substituting any provision they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted." * * *

These two cases are followed and approved in *Harrington v. Wands*, 23 Mich. 385; *Ripley v. Evans*, 87 Mich. 217.

This by no means exhausts the authorities which might be referred to, but we deem it unnecessary to extend the opinion upon this point as we have no doubt of the constitutionality of the amendment.

It is next insisted that the first count in the indictment does not state any offense under the statute. With this we are compelled to disagree.

The first count in the indictment in substance charged

that David Heller, defendant, was the financial agent of Caroline Spindler, for the purpose, among other things, of borrowing and lending money, and that as such financial agent he had the general charge and management of the financial affairs of Caroline Spindler. That on the first of October, 1889, the said defendant, Heller, then being the general financial agent of said Caroline Spindler, did by virtue of his said agency and the confidential relation existing between them, receive and take into his charge, custody and possession, and was intrusted with, by the said Caroline Spindler, one promissory note * * * of the value of \$1,200 for the purpose of negotiating a sale of the same for the sole use and benefit of said Caroline Spindler; that the said David Heller then and there feloniously and fraudulently did embezzle, steal, take and carry away said note with intent then and there feloniously to steal the same and did unlawfully and feloniously convert the note to his own use with like intent to steal the same.

The foregoing is not a literal copy of the count but, as before said, states the substance and is enough, for the purpose of illustrating our views.

The statute provides that if any agent to whom any money, bank bill, note, goods or chattels shall be intrusted or delivered by any other person, or into whose hands such bank bill, note, goods or chattels shall come by virtue of his or her employment or confidential relation to his or her principal or employer shall withdraw himself from his principal or employer, or go away with the said note or any part thereof, with intent to steal the same contrary to the trust and confidence in him or her reposed, or shall embezzle the said note or any part thereof, or otherwise convert the same to his or her own use with like purpose to steal the same, every such person so offending shall be deemed guilty of larceny and punished accordingly.

By reading the section from which the above is extracted it will be observed that a clerk, apprentice, agent or employee are enumerated as the individuals who are amenable to this law. And the parties who may be defrauded or against

whom the crime may be committed, are master, mistress, principal or employer, and that the mode by which the crime may be committed against these individuals is by withdrawing from the master or mistress, principal or employer, or going away with the property with intent to steal the same or with intent to defraud the master, mistress, principal or employer contrary to the trust and confidence reposed in such clerk, apprentice, agent, or employee, or who shall in any wise convert such property with like purpose of stealing the same shall be guilty of larceny.

By the first count in the indictment it clearly appears that the relation of agent and principal is distinctly set out. The fact that the note was intrusted to the care of the defendant is alleged, and the purpose for which he was intrusted with the property is also therein embraced. And this is followed with the further allegation that he converted the said note with intent to steal the same.

In the case of *The People v. Noyce*, 86 Cal. 393, it was held that where the facts constituting the crime of embezzlement are fully stated in the information, such information is sufficient, although the accused is not called in the information bailee, trustee, or agent, or formally put into any of the classes named in the sections of the Code which define embezzlement. *People v. Johnson*, 71 Cal. 389.

The State v. Combs, 47 Kans. 136, supports us in the conclusion above announced. In the course of the opinion the court says: "Although the charge does not fully state the facts and circumstances of the bailment, it fairly indicates the character of the same. It shows who placed the money in his hands, the purpose for which it was intrusted to him, and wherein he has failed to carry out the trust. It states that the money was intrusted to him for safe custody, but, instead of safely keeping the money, he embezzled and converted the same to his own use, and did feloniously steal and carry it away." In this case it is also held that the sufficiency of the information should have been raised by motion to quash and that it was too late for the defendant to avail himself of

the technical error in form, or mere imperfection in the statement of the complaint.

We see no defect in this count in the indictment, but on the contrary feel constrained to say that the count indicates that the pleader exercised unusual care in drawing the same in order to bring the defendant within the provisions of the statute. And in this connection we may pass upon the further contention that the note described in the indictment does not correspond in words and figures with the note introduced in evidence as the one delivered by the principal, Caroline Spindler, to defendant, Heller. The indictment recites why this discrepancy exists. The note was not in the possession of the grand jury, or in the possession of any one connected with the prosecution, so that the exact description could be given. This however is not fatal because the description of the note was not necessary. It would have been sufficient to have alleged a certain promissory note, or a certain note of the value of \$1,200.

The State v. Combs, supra, was a case wherein a party had been charged with the embezzlement of \$530 current money of the United States, consisting of national bills commonly called greenbacks, national bank bills, silver certificates and gold certificates, and it was held that this description, coupled with an allegation of inability to give the denomination and number of each, or a better description of the money embezzled and stolen, was sufficient, and especially so when the objection was not made until after verdict had been returned. *State v. Henry*, 24 Kans. 457; *State v. McAnulty*, 26 Kans. 538.

Thus far we think that we have disposed of the grounds urged upon our attention by the original brief in this case. We shall now proceed to the examination of such errors as we deem worthy of consideration relied upon in the supplemental brief.

The first point raised is that failure of the proper officers of the court to furnish the defendant with a list of the jurors and witnesses at the January term, 1891, is a reversible error.

We cannot agree with this view. The provisions of the statute are that previous to the arraignment of a prisoner for murder or other felonious crime, he shall be furnished with a copy of the indictment and a list of the jurors and witnesses, and the record discloses the fact to be that this provision of the law was fulfilled. That subsequently at the September term defendant was tried, and again at the succeeding January term. We hardly think that the statute can be so elastic as to be construed to impose upon the prosecuting officer the duty of furnishing the names of the witnesses and a list of the jurors, together with a copy of the indictment at any other time than previous to arraignment. The copy of the indictment and the list of the witnesses were all within the control and knowledge of the defendant, and we assume that at the succeeding term, if he had desired, he could have obtained a list of the jurors. At any rate we feel that the duty imposed by the statute was performed.

The next point is the delay in bringing the defendant to trial. It is insisted that under the provisions of the habeas corpus act, Mills Ann. Stats. § 2113, vol. 1, p. 1295, the defendant was entitled to be discharged. The provision of that section is that, "If any person shall be committed for a criminal or supposed criminal matter and not be admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court at the second term shall be satisfied that the due exertions have been made to procure the evidence for and on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case until the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the people of the state

are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material."

The indictment in this case was presented at the January term, 1890, and was tried at the September term of the same year. The result of that trial is not disclosed by the record, but we assume that there was a mistrial. At the succeeding January term, 1891, the defendant was put upon trial again without objection, and the record does not disclose whether or not at the previous trial any objections were interposed or that this statute was invoked. We do not think that the defendant is in a position, under these circumstances, to insist upon a reversal of this judgment under the provisions of this section, because the court after the trial and upon a motion in arrest of judgment refused to discharge him.

This brings us to the consideration of the question of misconduct of counsel for the state. We admit that the remarks incorporated into the record as having been uttered by the prosecuting attorney were highly improper and unwarranted, but in the face of the fact that the record shows that objections were interposed by counsel for defendant, and that those objections were sustained and the remarks eliminated, and counsel cautioned by the court to refrain from further comments of that nature, that the defendant secured through the court a correction of this misconduct, and we are warranted in assuming that in view of the action of the court, that the jury were not influenced or prejudiced against the defendant by the course pursued by counsel for the prosecution.

We do not feel that we would be justified in further considering in detail the errors assigned. We have carefully read the record and considered the instructions and reviewed a majority, if not all, of the authorities cited by counsel pro and con, and have reached the conclusion that there is no error in the record which would warrant us in reversing the judgment.

Therefore the judgment is affirmed.

Affirmed.

BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY,
APPELLANT, v. BROWN, APPELLEE.

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1. TRADE FIXTURES—RIGHT OF REMOVAL.

Trade fixtures do not become the property of the landlord, if they are removed during the term, or afterwards with his consent. It is not essential to the application of this rule, that the business in which the fixtures were used is distinctively commercial.

2. ACTION AGAINST COUNTY—CUMULATIVE REMEDY.

One whose claim against a county has been presented to and disallowed by the board of county commissioners, has the right to elect to appeal from the decision of the board, or bring an independent action.

3. PRACTICE—JURY FEE.

The failure of the court below to compel the plaintiff to advance the jury fees is not such an error as to warrant a reversal of the judgment.

4. PRACTICE.

A recovery can be had in an action for use and occupation where the defendant holds over after the expiration of his term.

Appeal from the District Court of Pitkin County.

Mr. C. S. WILSON, for appellant.

Mr. J. M. DOWNING and Mr. H. L. MCNAIR, for appellee.

BISSELL, J., delivered the opinion of the court.

On the 1st of February, 1890, Brown and Hoag leased certain rooms in a building in Aspen to the authorities of Pitkin county. The lease was for a year at a reserved rental of \$200 per month, and contained an express agreement that at the expiration of the term the lessees could remove furnishings and fixtures from the premises. Under this lease the county authorities went into possession, and built a brick vault for the use of the officers of the county, and laid the foundation on the ground. Shortly before the term expired the county began to remove what it had put into the building, and through some individual members of the board of

county commissioners had a conference with the lessors as to the time within which this work should be done. The vault was treated as a fixture, and the authorities commenced tearing it down and taking away the material which composed it. During this proceeding the keys of the place were tendered by some member of the board to the lessors, who refused to receive them while the county still occupied the premises. Negotiations were then initiated between the parties. It is fairly deducible from the record that the result was substantially the consent of the lessors to the removal of the structure. The county continued to occupy the rooms and to remove the stuff which they had placed in the building. This lasted for about two months. At the end of that time they surrendered possession. The lessors accepted the surrender, but then asserted a claim against the county for the value of the use of the premises during that period, and damages for the removal of the vault. This action was brought to recover what they claimed, and resulted in a verdict of the jury against the county for the sum of \$400, which would have been the amount of the rental value if the action had been brought directly on the lease. There was a great deal of contention on the trial, and there has been much urged in the argument, regarding the right of the tenant to remove the vault as a fixture under the express reservation contained in the lease. The general maxim, of course, is *quicquid plantatur solo, solo cedit*, but the rule is subject to many exceptions and modifications. It has never been true that trade fixtures became the property of the landlord if they were removed either during the term or afterwards by his consent, even though there was no express covenant in the lease. There are likewise many mixed cases where the fixtures are not exactly trade fixtures, in the sense in which those words are ordinarily used, but they are fixtures essential to the business carried on by the lessee. Ewell, Fixt., p. 81, *et seq.* If it were necessary, we should be inclined to hold, under the proofs in this case, that these fixtures come within the principle applicable to the removal

of trade fixtures, and the county had the right to take them away before the expiration of the term. The lease was granted for a special purpose and a particular occupation. A vault was absolutely indispensable to the safe transaction of the business of the county. It is not essential to the application of the rule that the business should be distinctively a commercial one. The law will endeavor to protect the tenant in the removal of what he has been compelled to add to the property for the safe, convenient, and economical transaction of the business carried on in the premises with the consent of the landlord, due regard being given to the rights of the owners of the realty. We think, however, that the proof shows very satisfactorily that the removal was virtually without objection from the lessors, and that the county was permitted to remain in possession during the time they were occupied in tearing it down and taking it away. Both parties treated it as a fixture, and apparently recognized the right of removal, so that, in any event, the question of the character of the structure remains a question which need not be authoritatively determined.

This action was commenced directly in the county court to recover what the plaintiffs claim to be due. The proof showed that they had presented the claim to the board of county commissioners for allowance and that it had been disallowed. It is now seriously contended by counsel that the plaintiffs were without right to institute the suit, and that their only legal remedy for the enforcement of the claim was by appeal from the action of the board to the district court under section 547 of the statutes. It is needless to enter into an elaborate discussion of this question, for this particular proposition was settled after full discussion in a case decided at the present term of this court in *Board of County Com'rs Park Co. v. Locke*, post, 508. In that case we held that the remedy was a concurrent one, and that the party might either appeal, or bring an independent action, according to his election.

The case was tried to a jury. Before it was impaneled,

the appellant, the board of county commissioners, interposed a challenge to the array, and raised the further objection that the plaintiffs were not entitled to a jury, since they had failed to pay the fees in advance. The act of 1891 (Sess. Laws 1891, p. 248) undoubtedly provides the mode to be pursued by the authorities of the county in the procurement of juries. It is impossible to determine from the abstract whether the board had failed to take the steps which the statute directs, or whether some other reason determined the action of the court in the premises. It is plain that this must prevent any clear determination that the action of the court was irregular. Had this showing been made, it would have been equally futile for the purposes of a reversal. The act of 1891, in section 5, distinctly provides that the courts shall have power to procure juries by an open *venire*, according to the ancient practice, whenever it may happen that one is not in attendance for the trial of causes under the procedure prescribed by the act. It was not error to overrule the challenge. The failure of the court to compel the plaintiff to prepay the fees is not such an error as warrants us in disturbing the judgment. The act of 1891, in section 9, undoubtedly provides that in certain counties therein specified the plaintiff's right to demand a jury in the county court is dependent upon the prepayment of the fees at the time of the demand. It was doubtless the duty of the court to compel the plaintiffs to advance these fees before they called the jury into the box. Statutes like this have frequently been held constitutional, and it is fully within the power of the legislature to put that restriction upon the right to a trial by a jury in such courts. Failure to compel the prepayment, however, cannot be permitted to disturb the validity of the judgment which the plaintiffs have recovered, for it is an error which has worked no harm, since an adverse judgment would necessarily include the fees advanced. The amount of the recovery therefore, was neither increased nor diminished by the failure, and the appellants may not complain.

The only remaining question of any moment in the case

is that presented by what at the common law would be termed the "form of the action." Counsel for the appellant, with very considerable research and learning, argue that the plaintiffs could not recover in an action for use and occupation. It may well be conceded that possibly this was true at the common law, and that it would have been very important for the plaintiffs to determine whether they would bring *indebitatus assumpsit*, or whether their action should be in debt or by way of trespass for mesne profits. The books are full of learned and intricate discussions on this question, but under the procedure in this state is of little more value to the practitioner than a full and accurate knowledge of the mode of trial by wager of battle. It is only important now for the pleader to state in his complaint the facts out of which his cause of action arises. If he state what would enable him to recover in any one of the three forms of action at the common law, and his proof supports his allegation, he must have judgment for the sum to which he proves himself entitled. In this case the record clearly shows that for two months the county remained in possession of the property after the expiration of their term. The value of this use was proven to be \$200 per month. The recovery was for \$400. The plaintiffs attempted to claim more by way of damage to the premises, but evidently the evidence was not deemed sufficient to warrant a verdict. Since the record discloses the fact that the county did remain in possession for a period sufficiently long to justify the recovery, and there is no question in this case as to their responsibility as for an unexpired term, there is nothing in the contention concerning the form of the action to justify us in disturbing the judgment. It cannot be insisted that the consent of the lessor to the removal after the expiration of the term would excuse the county from its responsibility as for the use and occupation. The time they took would not be reasonable, under any circumstances, for such a purpose, and if they desired to remove a fixture of that magnitude under the lease they should have completed it before the expiration of the term, or secured

such an express consent to occupy after its termination as to completely negative their legal responsibility for use and occupation. The evidence in this case does not bring the county within the scope of any adjudication on this matter. The case was fairly tried, the judgment is warranted by the record, there are no errors in it which compel us to reverse the case, and the judgment will accordingly be affirmed.

Affirmed.

BAKER, PLAINTIFF IN ERROR, v. RILEY, DEFENDANT IN ERROR.

ESTOPPEL.

Where one of two innocent parties must suffer by the wrongful act of a third, it must be he who, by his conduct or silence, enables the wrongdoer to perpetrate the fraud.

Error to the County Court of Arapahoe County.

Mr. O. BOWER, for plaintiff in error.

Mr. G. F. DUNKLEE and Mr. O. E. JACKSON, for defendant in error.

REED J., delivered the opinion of the court.

Plaintiff in error and one Crandall were brothers-in-law; the latter, in indigent circumstances, wanted to engage in the business of expressman, and needed a wagon which he was unable to purchase. Plaintiff, to assist him, agreed to pay for one; Crandall selected the wagon; had it painted, completed and numbered under his direction; when completed he hitched on to it and, accompanied by the seller, drove to plaintiff's place of business, where plaintiff paid for it \$125, and took a bill and receipt for it in his own name. The actual possession was in Crandall, who retained it and used it

in business for several months; during that time he borrowed money from one Bean and executed a chattel mortgage upon the wagon to secure it.

In July, 1891, Crandall sold and delivered the wagon to one Orrick and left the country. Orrick shortly after sold and delivered the wagon to Riley, defendant in error. Some days afterwards plaintiff in error asserted his title and demanded the possession. During this time Orrick, having learned of the outstanding mortgage to Bean, bought it to protect the title in Riley to whom he had sold it. Riley refusing to deliver the wagon to plaintiff, suit was brought before a justice of the peace; a trial had; an appeal taken to the county court; a trial had to the court without a jury; judgment found for the defendant, from which error was prosecuted to this court.

There are no questions of law involved except the question of estoppel, growing out of the established facts. The testimony was not conflicting to any great extent,—Crandall and other important witnesses were absent. The plaintiff established the fact of the payment of the purchase price of the wagon; also testified that he rented it to Crandall, and that he paid in small sums at different times about \$27 for its use. Other witnesses established the fact that Crandall retained the possession of the wagon as the ostensible owner, claimed to be the owner, had it repaired at the shop of Orrick on two occasions as his own, paying the bills for repairs, and mortgaged it to Bean long prior to the sale of it as stated.

Plaintiff asserted no title until after Crandall had left the country, and gave no notice of his ownership. The evidence of the defendant, to fix upon the plaintiff knowledge of the different acts of ownership exercised by Crandall, was unsatisfactory, but there was evidence of facts that would go far toward establishing the inference or a presumption that plaintiff knew that Crandall was dealing with others in regard to the wagon as with his own property. The evidence of plaintiff in regard to the renting of the wagon to Crandall was very much mixed and very unsatisfactory; he did not testify

to any contract of renting or agreement as to a price or as to terms of payment, and although he testified generally to have received \$27.00 as rental, he could not give dates nor amounts of payments going to make up the aggregate. The court evidently disregarded the evidence on that point as insufficient to establish the fact of a rental, evidently thinking that the payments, if made, might with equal propriety be regarded as a part of the purchase price. The fact that there were no acts of ownership, assertion of title or notice until some days after Crandall had sold the wagon and left the country would, of necessity, greatly influence the court in arriving at a conclusion in regard to the facts. The credit to which a witness is entitled depends so much upon the character of the testimony, and the manner and bearing of the witness, that a trial court might be warranted in rejecting evidence that might be entitled to full credit when printed and presented to a court of review.

The only theory upon which the judgment can be sustained is that the conduct of plaintiff with reference to the wagon was such as to mislead in regard to the ownership and estop him from asserting his title. This view of it, under the circumstances, can be sustained upon the well-established rule of law that where one of two innocent parties must suffer by the wrongful act of a third, it must be he, who by his conduct or silence, enables the wrongdoer to perpetrate the fraud. The plaintiff's evidence to establish ownership was weak. The fact of the payment and taking a receipt was so at variance with his subsequent conduct as to be insufficient to establish the fact of continued ownership, while the evidence of the defense, in regard to sufficient knowledge on the part of plaintiff to create an estoppel, was weak and unsatisfactory.

A judgment might have been found either way with equal propriety, hence, the judgment will not be disturbed.

Affirmed.

BISSELL, J., dissents.

THE CATLIN LAND & CANAL COMPANY, APPELLANT, v.
BEST, APPELLEE.

1. PRACTICE—OBJECTIONS—EXCEPTIONS.

Rulings of the court below admitting or excluding evidence will not be considered on appeal, when the evidence was admitted without objection and no exceptions were saved.

2. PRACTICE—NONSUIT.

It is not error to refuse a nonsuit when there is evidence of damage for which a recovery could be legally had.

3. NEGLIGENCE.

Owners of ditches are liable in damages resulting from their neglect to carefully maintain and keep the embankments of their ditches in good repair.

4. CONTRACT RELEASING DAMAGES, HOW CONSTRUED.

A contract releasing the ditch company from damages by reason of unavoidable accidents and breaks of the canal would not cover a case of gross and continued negligence.

Appeal from the County Court of Otero County.

Mr. GEORGE A. KILGORE, Mr. W. E. BECK and Mr. H. B. JOHNSON, for appellant.

Messrs. RIDDELL, STARKWEATHER & DIXON, for appellee.

REED, J., delivered the opinion of the court.

Appellant was the owner of and managing an irrigating canal. Appellee was the owner of, or at least in the possession of farming land under the canal. In February, 1889, there was a limited, but quite large volume of water being carried in the canal for the domestic use and convenience of its patrons. Some time during the month of February a large break occurred in the bank of the canal and the water passed down upon, and over the land of appellee, causing damage. Appellant had no one in the actual care of the ditch, paid no attention to the break, made no effort to re-

pair it; appellee made some ineffectual efforts to repair the break and stop the water.

The break remained and the water continued to flow on appellee's land some three weeks, submerging it and creating a lake covering several acres, which remained for a long time until taken up by evaporation and absorption. The water also cut through at the point of its discharge into a creek, leaving a large excavation and destroying some land. It also appeared that the land submerged was seeded to alfalfa, and a crop upon some seven acres was destroyed by reason of the water. Also that a natural pasture was destroyed or rendered inaccessible, and that by reason of it appellee was compelled to feed out a quantity of hay and straw to his stock. A suit was brought by appellee for the damages sustained; a trial was had to a jury, resulting in a verdict and judgment of \$80.00 against the canal company.

The errors assigned and relied upon are, the admission of improper evidence; the exclusion of proper evidence, refusal to grant a nonsuit, and to the instructions given and refused.

Upon the trial, it must be conceded, that the evidence of the plaintiff took a wide range, and that some of the damage was rather remote and questionable, but no objection was made or exceptions saved, nor were any exceptions saved to the refusal of evidence offered by the defendant; hence, the supposed errors will not be considered. The court was justified in refusing a nonsuit. Mixed with much testimony of damage of a nature inadmissible, was also much proper evidence of damage, for which a recovery could be legally had, which were questions of fact that were properly left for the determination of the jury. The jury was warranted by the undisputed facts in evidence, in finding the canal company culpably negligent and guilty of violating the statute, and in awarding proper damage. The amount was purely a question of fact to be determined from the evidence. It is apparent from the amount of damage found that a considerable portion claimed was disallowed. It is impossible to determine from the record whether the amount allowed was for

damage legally chargeable, or too remote to be legally considered, but the amount was so small it might have been predicated upon either. The legal presumption must be that the former was considered and the latter disallowed.

Sec. 1733, Genl. Laws, p. 565, is: "The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair and prevent the water from wasting."

Sec. 1737, p. 566: "Owners of all ditches shall be liable for all damages resulting from their neglect or refusal to comply with the provisions of sec. 1 (1733) of this act."

While, as contended, the break may have been accidental and caused by no failure or neglect, it was the duty of the company to repair it at the earliest practicable opportunity; to allow it to remain unrepaired for two or three weeks was, under the circumstances, negligence *per se*, for which it was clearly liable.

Two of the instructions given for the plaintiff are upon a question not properly involved—a question of contract between the parties, made the preceding year, in regard to the sale of water to appellee during the irrigating season, in which it is claimed the canal company was released from all liability for damage by breakage of the canal, which was relied upon by the appellant, but which by its own limitation had expired the preceding November; hence, could not be used as a defense. These instructions in no way prejudiced the defendant. The others given are unobjectionable, being merely a statement of the statute provisions cited above. Those given for the defendant are rather at variance with those given for the plaintiff, and are more favorable than warranted by the law and the facts. The other instruction asked was very properly refused. It was to the effect that the contract for the use of water, that, by its terms, expired November 1st, the preceding year, would, in the absence of a new contract for the ensuing year, remain in force and control the parties. Comment upon it is unnecessary. Even if there had been an existing contract releasing the company

from damages by reason of unavoidable accidents and breaks of the canal, it could not cover a case of gross and continued negligence, as in the case under consideration.

There being no serious errors as to the law, and the questions of fact having been settled by the verdict of the jury, the judgment will not be disturbed.

Affirmed.

WICH, PLAINTIFF IN ERROR, v. THE EQUITABLE FIRE AND
MARINE INS. CO., DEFENDANT IN ERROR.

1. INSURANCE—CHANGE OF TITLE.

The clause in a policy of insurance providing against a change in the interest, title or possession of the property insured, is not violated by a change, not in the fact of title, but only in the evidence thereof. If the change is merely nominal and not of a nature calculated to increase the danger of loss, the policy is not violated.

2. INSURANCE—INCORRECT STATEMENTS.

It is a good answer to a plea setting up as a breach of the condition of a policy that the interest and ownership of the assured in the property is incorrectly stated, to show that it was so stated by the mistake or wrongful act of the agent to whom the application was made, that he was fully advised as to the fact and was acting within the scope of his authority.

3. BURDEN OF PROOF.

When the insurer sets up want of title in the assured, the burden of proof devolves upon him of establishing, not only that the assured had no title to the property, but also that he had no insurable interest therein.

4. POLICY—PRIMA FACIE EVIDENCE.

A policy issued to a person is *prima facie* evidence of his title to the premises, and, unless questioned, is conclusive.

5. INSURANCE—OWNERSHIP.

The purchaser of real estate by contract is the equitable owner, and, for the purpose of insurance, may be said to be vested with the entire, unconditional and sole ownership of the property.

6. FRAUD—BURDEN OF PROOF—PRESUMPTION.

If fraud on the part of the assured is set up in avoidance of the policy, the insurer must establish it by competent affirmative evidence, as

2	484
6	106
6	117
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11	277

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16	481

it will be presumed that the assured acted honestly and in good faith.

Error to the District Court of Arapahoe County.

FEBRUARY 4, 1889, The Equitable Fire and Marine Insurance Company, defendant in error, made and delivered to John Wich, plaintiff in error, in the business name of The Arkansas Valley Brewing Company, its policy of insurance for the sum of \$1,530 upon certain buildings and personal property to run for the period of one year.

September 5, 1889, the buildings and their contents were destroyed by fire. Proof of loss was made and the company denied any liability under the policy. This action was brought to recover the sum mentioned.

The answer is general and specific. It denies that the business name of the plaintiff was The Arkansas Valley Brewing Company; that the property insured was the property of plaintiff at the time of the issuance of the policy or at the time of the loss. It admits that the policy was issued to The Arkansas Valley Brewing Company, but alleges it was procured by false and fraudulent representations in this, that Wich represented he was the sole owner of the premises when in fact neither he nor the Arkansas Valley Brewing Company were sole owners. It is further claimed that the value of the property was not as represented.

From the record we learn that at the time of the issuance of the policy the property stood in the name of Gottlieb Hess, Paul Voght, Harmon Ell and the plaintiff Wich. Wich testified that at the time of the issuance of the policy he explained the nature of his title to the agent asserting that Hess, Voght and Ell had only a conditional interest in the property; that they had agreed to put in as their part of the purchase price the sum of \$3,000 each within a certain time, and in case of default they would transfer their interests to him; that in the month of May, 1889, Hess, Voght and Ell executed a quitclaim deed to him of their entire interests, thus making him, as he represented himself to be,

the sole owner of the property in fee, subject to a certain incumbrance. It is in testimony also that Wich was doing business in the name of The Arkansas Valley Brewing Company, although it does appear from the record that, in response to a direct question as to whether he was doing business in such name, he answered, "No, sir." Yet he qualifies this answer immediately afterwards. It further appears that the policy of insurance was issued prior to the signing of the application. The cause was tried to a jury, and at the close of the plaintiff's testimony motion for a nonsuit was made and granted. To reverse this judgment this writ of error is prosecuted.

Mr. CHARLES M. BICE and Mr. S. D. WALLING, for plaintiff in error.

Mr. C. J. HUGHES, Jr., for defendant in error.

RICHMOND, P. J., after stating the facts, delivered the opinion of the court.

The main contention of the defendant company is that the title of the property at the time of the issuance of the policy was not in the plaintiff, and that by the terms of the policy it is provided that if the interest of the insured be other than unconditional and sole ownership, or not owned by the insured in fee simple, or if any change takes place in the interest, title or possession of the property (except change of occupants without increase of hazard), whether by legal process, judgment or voluntary act of the insured, or if the building remains vacant for ten days * * * then the policy shall be void. The policy may have been issued by the company upon the representations of the plaintiff that he was the owner in fee of the premises, although he claims that at the time he notified the solicitor of the condition of the title. Admitting that the title did not stand in the name of the plaintiff at that time—it certainly did long prior to the destruction of the property by fire—and in keeping with the

understanding of the company at the time of issuing the policy.

“The object of providing against a transfer or change of title is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property; the substantial diminution of interest in the property insured has been suggested as a test of the kind of transfer or change of title which will avoid the policy.”

In *Ayers v. Hartford Fire Insurance Company*, 17 Iowa, 176, the court, in discussing what transfer or change of title would avoid the policy, used the following language: “The object of the insurance company by this clause is, that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the insured in the property of a nature calculated to have this effect is in violation of the policy. But if the real ownership remains the same—if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire,—the policy is not violated. * * *” May on Insurance, § 273.

The evidence as disclosed by the record, so far as it relates to the title, clearly brings the parties to this action within the above rule. We are unable to see how it can be claimed by the company that the change in the title constituted a diminution of the interest on the property insured, or a diminution of the motive which the insured may have had to be vigilant in the care of his property. The title subsequently acquired was the title upon which the company acted when it issued the policy. We think it can fairly be argued that, had the title continued in the four individuals above named, the company might have insisted that the policy was void because of the misrepresentations, unless, as it is claimed, the character of the title was fully made known to the agent

of the company. If it was, then the following rule is applicable.

“If the interest of the assured is incorrectly stated in the policy, through the mistake or wrongful act of the defendant's agent, to whom the application was made, the facts being truly and fully stated to him, and he having authority to take applications, deliver policies and receive premiums, this would be an answer to a plea setting up a breach of the condition as to the statement of the interest and ownership of the assured:” *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189; *State Ins. Co. v. Taylor*, 14 Colo. 499; *California Ins. Co. v. Gracey*, 15 Colo. 70; *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615; *Mowry v. Rosendale, Receiver*, 74 N. Y. 361.

“Possession of real or personal property, claiming it as owner, is *prima facie* evidence of title, and all presumptions are made in its support, and if the insurer sets up want of title in the assured, he takes the burden of establishing, not only that the assured had no title in the property, but also, that he had no insurable interest therein.” * * * Wood on Fire Insurance, vol. 2, p. 202.

“The issuance of a policy to a person is *prima facie* evidence of his title to the premises, and unless questioned is conclusive.” *Fowler v. New York Insurance Company*, 23 Barb. 143.

The evidence does not show that the risk was in any way increased or made more hazardous by the change of title. On the contrary, it shows that the circumstances under which the policy of insurance was issued, the belief and understanding upon which the company acted, were fully perfected, and that the hazard and risk were identically the same as when the party paid his premium and secured his policy. The mere fact that the deed was originally made to the four individuals upon the understanding existing between Wich and the others—that in case they were unable to fulfill the conditions upon which their title rested by paying a certain sum of money—does not take the case out of the operation of the general rule controlling contracts of this kind. The failure

to pay the money would have given Wich an undoubted right of conveyance from them and, as is unusual in such transactions, it seems they recognized their obligation to vest the title in Wich, and did so by a deed making him the sole owner.

The case of *Hough v. City Fire Ins. Co.*, 29 Conn. 10, was one where the legal title to the property was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase, for a price agreed upon, which the insured had agreed absolutely to pay, and a part of which he had paid, and had entered into possession as purchaser, and made valuable improvements. Upon the claim of the insurance company, in a suit on the policy, that the insurance was void by reason of the omission of the insured to state in his application the condition of the title, the court charged the jury that the plaintiff was to be regarded as the owner of the property, if he had the equitable title, and his interest was such that the *loss should fall upon him* if the property was destroyed. This charge was held to be correct, and the court in its opinion said: "That is to be regarded as an absolute interest, which is so completely vested in the party owning it that he cannot be deprived of it without his consent."

Gaylord et al. v. Lamar Fire Ins. Co., 40 Mo. 16, was a case where no written application was made before the policy was issued. The verbal representation was simply to the effect that the insured were the owners of the property. The court in the course of its opinion said: "An equitable title that would be protected by a court of equity as such, may be an ownership as absolute as the legal title."

In *Elliott v. The Ashland Mut. F. Ins. Co.*, 117 Pa. St. 548, it was said that: "The purchaser of real estate by contract is the equitable owner, and liable to all loss that may befall the property, including loss by fire; wherefore, the holder of such title, for the purpose of insurance, may be said to be vested with the entire unconditional and sole ownership of the property."

It is also insisted that the property was insured by the plaintiff in excess of its valuation, and in excess of the amount based upon such valuation in violation of the policy of insurance. And, also, that the representations concerning the watchman in the building and as to the value of the property were false. All these questions were raised by the pleadings and were questions of fact. And we think the universal rule is that: "It is for the jury to say whether the facts concealed or misstated were material to the risk, and the burden is upon the insurer to establish the materiality of the representation and its falsity. If fraud on the part of the assured is set up in avoidance of the policy, the insurer must establish it by competent affirmative proof, as it will be presumed that the assured acted honestly and in good faith, until the contrary is satisfactorily established. In order, however, to avoid a policy upon the ground of misrepresentation on the part of the assured, it is not necessary that a fraudulent purpose or intent, on the part of the assured, should be established. It is enough if the representation was in fact false, and was material to the risk." Wood on Fire Insurance, p. 572-3.

The question as to whether there has been a breach of warranty, or whether certain representations are false in a substantive manner, is wholly for the jury, and their finding, unless clearly contrary to the evidence, cannot be disturbed. *Boos v. The World Mut. Life Ins. Co.*, 64 N. Y. 236.

It is for the jury to say whether or not a misdescription was material to the risk; so as to misrepresentation or concealment, whether there has been a breach of the warranty, and, in a case where the warranty is dependent upon a matter of fact, whether a warranty exists. It is for the jury to say whether there has been a material alteration or increase of the risk, * * * and indeed all questions of fact arising under the issues made are exclusively for the jury, and it is error for the court to trench upon their province. Wood on Fire Insurance, vol. 2, p. 1116-7.

The plaintiff insists that so far as the title was concerned,

full and true representations of the condition of the title were made to the representative of the company. It is true they were not made at the time of the application, but the record as it now stands shows that the application was made and executed after the issuance of the policy and the payment of the premium. What the application may contain, or in what way it may be liable to attack is not now before us, because the application, while it is referred to as a part of the policy, was not introduced in evidence, although an effort was made to that effect by the company. But as to whether these representations are true or not, as to whether the condition of the title was explained or not, is a question of fact and one that should have been submitted to the jury. So, also, the question of the value of the property.

The record clearly discloses a state of facts which entitled the plaintiff to go to the jury.

The judgment must be reversed and the cause remanded for further proceedings.

Reversed.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT, v. CORNWELL, APPELLEE.

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11	332

1. TELEGRAPH COMPANY, LIABILITY OF.

A telegraph company failing to deliver a telegram is liable for such loss or injury as is the direct, natural and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the message.

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In order to charge a telegraph company, the loss or injury must be the direct and necessary result of its negligence in transmitting the message, but contributory negligence of the plaintiff may prevent a recovery.

3. DAMAGES.

Speculative, contingent and remote damages, which cannot be directly traced to a breach of contract or negligence on part of the company, cannot be recovered for a failure to deliver the message.

4. NOMINAL DAMAGES.

When the company is not made aware of the purport or importance of a message and contracts without full knowledge of its importance, and loss is occasioned by failure or negligence of the company in the transmission or delivery, only nominal damage, or the price paid for transmitting the message, can be recovered.

Appeal from the District Court of Chaffee County.

CORNWELL, the appellee, was engaged in the watch and jewelry business in Salida, and had in his employment a man by the name of Strauss. About May 11, 1889, appellee was temporarily absent at Monarch, a small place some twenty miles distant, where he remained over night, leaving Strauss to look after the business. During the night or early in the morning, Strauss robbed the store and absconded with several watches and other property. In the morning, a Mr. Chester, a friend and business neighbor, learned that Strauss had gone away and observed that the place of business was not opened; went to the telegraph office and left the following dispatch, paying for its transmission:

“SALIDA, Colo., May 11, 1889.

“To L. F. CORNWELL, Monarch.

“Strauss gone to Howard. Gave man gold watch by mistake. Left no word with me. Store closed. Answer.

“CHESTER.”

It is established by the evidence and practically conceded that the message remained in the office an hour and a half before it was sent, and that it remained at the Monarch office nearly two hours before it was delivered or an effort was made to deliver it. On receiving the dispatch, appellee went to the telegraph office and had communication with Chester, left Monarch for Salida, reaching there at three or four o'clock P. M. An examination of the premises disclosed the fact of the robbery. Although the robbery was supposed, by Chester and others, to have occurred, this was the earliest hour the fact was established. Appellee then telegraphed

to various points for the arrest and detention of Stauss, then left at 6.10 P. M. and went to Pueblo, where he again sent out several dispatches. On his way down at Canon City he learned that Strauss had gone over the road eastward. He arrived at Pueblo between twelve and one A. M. 12th inst.; remained there until between eight and nine A. M. awaiting dispatches; receiving none, left for Denver without leaving any address or stating his intention or destination. While he was still absent from Pueblo the following dispatches were received for him at the Pueblo office:—

“Received at 12.45 P. M. May 15, 1889.

Dated Norton, Ks. 12 via Pueblo 15.

To L. F. CORNWELL, Buena Vista, Colo.

Have had H. F. Strauss arrested. Is in charge of Sheriff of Norton, Norton County, Ks.

V. M. CHISBRO,
Cond'r No. 14.”

“Received at 12.45 P. M. Buena Vista, 1889, May 15.

Dated Norton, Ks., May 12, via Pueblo 15.

To L. F. CORNWELL, Buena Vista:

I have man answering description in telegram. Has ten or fifteen watches in his pocket; several gold watches. Wire instructions what to do.

A. BUTLER,
Sheriff.”

Appellee could not be found at Pueblo to receive the dispatches. They were offered to the sheriff of Pueblo county, and city marshal of the city of Pueblo, who declined to receive them. It will be observed that the dispatches were dated and sent to Pueblo on the 12th. On the 15th of May, appellee returned and reached Buena Vista, and the dispatches were forwarded to and received by him at that place on that date. The sheriff of Norton, Kansas, detained the prisoner and property twenty-four hours, and, receiving no answer to the dispatches sent, released him. Strauss was afterwards arrested and convicted, but a trifle only of the property stolen was recovered.

This suit was brought to recover from the appellant damages and value of the property lost, alleging that such damages and loss were attributable to the telegraph company by reason of its negligence in forwarding and delivering the telegram of Chester to appellee at Monarch on the morning of the 11th, a copy of which is given above. A trial was had to a jury, resulting in a verdict for plaintiff (appellee) for the sum of \$1,984.40, embracing the value of the goods taken by Strauss from appellee. A motion for a new trial was made, overruled by the court, and judgment entered upon the verdict.

Mr. JOHN L. JEROME and Mr. T. H. HOOD, for appellant.

Mr. JOHN R. SMITH, for appellee.

REED, J., after stating the facts, delivered the opinion of the court.

It may be conceded at the outset:

First. That appellant was guilty of gross negligence in transmitting and delivering the message of Chester sent to appellee on the morning of May 11th.

Second. That being guilty of gross negligence, an action could be maintained against it, and resulting legal damage recovered. The only question to be determined is one as to the amount and character of the damage for which the defendant should be held responsible.

It first becomes necessary to consider the facts and nature of the dispatch sent by Chester. At the time the dispatch was put in the office the facts of the robbery and absconding were not known. The telegram contained no such information. It, in fact, was a statement of facts directly at variance with those that existed, stating that Strauss had gone to Howard to recover a gold watch he had given a man by mistake. The only fact stated in it was that the store was closed; no facts or suspicions were communicated to the

operator in regard to what had actually occurred. All the information he had was that contained in the dispatch—facts requiring no action on the part of Cornwell.

The leading case in regard to damages for negligence in cases of this kind, is *Hadley v. Baxendale*, 9 Exch. 341.

“Now we think the proper rule in such case as the present is this :—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.”

That this is the well-settled rule in England, see further : 1 Chit. Pleadg. 395 ; 1 Saund. Pleadg. & Ev. 344 ; *Morris v. Langdale*, 2 Bos. & Pull. 284 ; *Vicars v. Wilcocks*, 8 East, 1 ;

Saunders v. Stuart, 1 L. R. C. P. Div. 326. And the same rule is well defined and settled beyond controversy in the United States.

It is said in *Shear. & Red. on Neg.* § 605, p. 692: "In case of failure to deliver a telegraphic message relating to business, the measure of damage should be only so much of the loss actually sustained as a person, familiar with business of the kind mentioned in the message, would be able to anticipate from its terms as a probable consequence of failure to deliver it. If the terms of a message do not convey its full value, the sender must inform the operator of that value, if he desires to hold the company to a corresponding responsibility; and even then he cannot recover for such additional value in case of neglect occurring at any other point than the place at which the message was first received, for the operator is clearly not bound to telegraph the peculiar information which he has received, unless paid for so doing."

In *Field on Dam.* § 422, it is said (p. 356):

"And where, as we have seen, the import of a telegraphic message is wholly unknown to the company's agent, to whom it is delivered for transmission, it cannot be assumed that he had in view any peculiar loss as a natural or probable result of a failure to send such message, and in case of a failure to transmit correctly and promptly, the company will be only liable for nominal damages, or the amount paid for sending the message; and the company would not be liable, under such circumstances, on account of loss sustained by the advance or decline in value of stocks or other property."

In *Suth. on Dam.* 298-9, it is said:

"Under this rule, only nominal damages or the price paid for transmitting the message can be recovered for neglecting to transmit or to deliver it, if its purport is not explained to the agent of the company or its operator, or if it is written in cipher, or is wholly unintelligible to him; for no other damages in such a case could be within the contemplation of the parties. The operator who receives, and who represents the company, and may for this purpose be said to be

the other party to the contract, cannot be said to look upon such message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. If ignorant of its real value and importance, it cannot be said to have been in his contemplation, at the time of making the contract, that any peculiar damage or injury would be the probable result of a breach of the contract on his part."

In *Griffin v. Colver*, 16 N. Y. 489, it is said:

"The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." See also *Crain v. Petrie*, 6 Hill (N. Y.) 522; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *Candee v. West. U. Tel. Co.*, 34 Wis. 471; *Landsberger v. Mag. Tel. Co.*, 32 Barb. 580.

Testing the dispatch in question by this rule, and considering the facts, it will readily be seen that there was nothing in it, or in anything that transpired between the parties to inform the operator that any loss whatever could occur to the sender or appellee by a failure to transmit the message at once, or anything involved that would subject the company to liability for anything more than nominal damage. There were no orders to do, or abstain from doing any act, or any facts communicated on which appellee could act, and the testimony shows that he was required to return and investigate before he could act; after receiving the message and communicating with Chester he could do nothing until he returned; that he returned upon the first train, and after his arrival first learned facts upon which he could act. Hence, it follows, that no such liability as is now claimed

was contemplated by either party at the time of the contract for the transmission of the message. Had the fact of the loss of the goods been known and communicated in the dispatch, the damage for failure to apprehend Strauss and recover the goods was too remote and contingent to be chargeable to the company.

The rule is clearly and tersely stated in 3 Suth. on Dam. 300, where it is said:—"The company is liable for such injury as is the direct, natural and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the correct message."

In *Rigley v. Hewitt*, 5 Exch. 240, Pollack, C. B. said:—"The law in general takes cognizance only of those consequences which are the natural and probable results of the wrong complained of, and which may reasonably be expected to result, under ordinary circumstances, from the misconduct."

In 3 Suth. on Dam. 303, the rule is stated to be, "The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. * * * Speculation, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded."

In *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198., one Brown left a message at the Chicago office to be sent to Lowery at Rochester, N. Y., requesting him to send him \$500. The message was negligently changed so that it read \$5,000, which sum was sent by express. Brown appropriated the money and absconded—about \$2,250 was recovered. Lowery brought suit against the telegraph company for the balance. Held by the court of appeals he could not recover. The court said: "The mistake of the telegraph company was the antecedent of the loss sustained by the plaintiff, but it was not, in a juridical sense, the cause of it. The plaintiff parted with his money by reason of the message, believing it to have been sent by Brown. He was willing to trust him with \$5,000, and the mistake of the company did not induce

the confidence which the plaintiff had in his integrity. When the money came to the possession of Brown he held it as the agent and trustee of the plaintiff. The plaintiff did not lose his title to it. He could reclaim it, and he did, subsequently, recover a part of it by legal proceedings. If Brown had not after receiving the money wrongfully converted it, the plaintiff's loss would have been comparatively trifling. The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant.

The cause of the loss was the criminal act of Brown, conceived and executed after the defendant had ceased to have any relation to the money. The plaintiff's right of action for the negligence was complete before the money was misappropriated by Brown; and if suit had then been brought, the damages could not have been measured by the amount of money sent by the plaintiff. The most that can be said is, that by the negligence of the company an opportunity was afforded Brown to commit a fraud upon the plaintiff. This does not, within the cases, make the company chargeable with the loss resulting from the conversion."

This decision is quite modern, by one of the ablest courts in the country. The case was carefully considered and many authorities cited and reviewed. It may be considered an extreme case and cutting very close to the line, but it is not necessary to resort to extreme cases of that kind. In every case it has been held that in order to charge the company the loss must be the direct and necessary result of the negligence; in other words, the negligence must be the direct cause of the loss sustained. See *McGrew v. Stone*, 53 Pa. St. 440; *Bank of Ireland v. Evans*, 5 H. L. Cas. 389; *Sully v. Duranty*, 3 Hurl. & Colt. 279; *In re U. S. Ser. Co.*, 6 L. R. Chy. Ap. Cas. 212; *Barker v. Perkerton*, 2 L. R. Exch. 340.

Applying this well settled rule of law to the facts of this case, and it at once becomes apparent that the value of the goods could not be recovered from the company. The loss occurred by the criminal act of the agent before the message was delivered to the company.

The cause of the loss was not the negligence of the company, but the crime of Strauss,—a matter in which the company was in no manner concerned. The loss had already occurred and was not the result of any act or negligence of appellant.

If the law, which I have attempted, above, to apply, is not conclusive of the case, there is another important factor involved that may be briefly considered, viz., the negligence of appellee. The original loss was that by the robbery of Strauss.

All the connection of the telegraph company was in the transmission of messages to apprehend him and recover the property. The theory of plaintiff below and the court was that the plaintiff by reason of its negligence prevented the capture and recovery, hence, was liable for the loss, notwithstanding the delay in ascertaining the fact of the robbery until 4 P. M. on the 11th, and the consequent delay in sending telegrams for his capture. As the result of those sent out between that hour and an early hour the next morning, some of them having been sent from Pueblo, Strauss was arrested on the 12th, at Norton, Kansas, with the goods in his possession, and two telegrams announcing the fact were sent to appellee at Pueblo, but as early as 8.20 A. M. of that day he had left for Denver, leaving no address or instructions to enable him to receive any messages that might arrive in answer to those sent, and leaving no person to attend to the matter in his absence. He could not be found; the city marshal and sheriff refused to receive them; they were advertised by the company as undelivered messages. It does not appear that he had any communication with the Pueblo office until the 15th, when they were re-sent to him at Buena Vista. The sheriff in Kansas in the meantime had retained the prisoner and property twenty-four hours, and, failing to receive instructions, had discharged him. This was solely the negligence of the plaintiff. No effort was made to connect the defendant corporation with it. The liability of the defendant being predicated only upon the escape of Strauss

with the goods, and that such escape was due to negligence in regard to the Chester telegram, we are at a loss to find upon what theory the company was held liable for the value of the goods after the arrest had been made and goods recovered, when the failure was solely attributable to the negligence and oversight of the plaintiff.

It is unnecessary to say that in this class of cases, as well as in all others where the question of negligence is involved, the contributory negligence of the plaintiff, when established, will prevent a recovery, although in this case the decision, as I have shown, need not be put upon the ground of contributory negligence; yet, if no other questions were involved, under the facts and circumstances of this case, I should not hesitate to hold that the negligence of the plaintiff was such as to preclude a recovery.

The suit is maintainable against the company for negligence in transmitting and delivering the message, but the damage cannot embrace the value of the goods nor the expenses incident to and for the purpose of arresting Strauss and recovering the goods, but must be confined to the price paid for the transmission of the message, and any incidental expense consequent upon the delay up to the time the plaintiff arrived at home and learned of the robbery, consequently, can only be nominal.

The judgment will be reversed and cause remanded.

Reversed.

RAWLES ET AL., PLAINTIFFS IN ERROR, v. THE PEOPLE
EX REL. CORNFORTH, DEFENDANTS IN ERROR.

2 501
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1. JURISDICTION—COUNTY COURTS.

A county court has jurisdiction of an action on an official bond when the amount claimed does not exceed \$2,000, notwithstanding the penalty of the bond is in the sum of \$5,000.

2. PRO RATA DISTRIBUTION.

When the statute providing for a pro rata distribution among attach-

ing creditors was in force, the sheriff was under no obligation to pay out the proceeds acquired under their attachments until so ordered by the court.

3. AMENDMENTS.

A complaint may, in furtherance of justice and on such terms as may be proper, be amended by adding the name of a party plaintiff.

4. JUDGMENT—COLLATERAL ATTACK.

A judgment of a court of general jurisdiction cannot be attacked in a collateral proceeding.

5. PRACTICE.

Where the judge of the court was *ex officio* clerk, there was no occasion for an order of court to the clerk to make an assessment of the several amounts each attaching creditor was entitled to out of the property attached. The assessment having been made by the judge in his capacity as clerk it was sufficient.

6. SAME.

One who has been made a party to an action and appeared without objection will not be heard, on error, to object, for the first time, that he was not a proper party.

Error to the District Court of Ouray County.

Messrs. STOREY & STEVENS, for plaintiffs in error.

Mr. R. D. THOMPSON, for defendants in error.

RICHMOND, P. J., delivered the opinion of the court.

In January, 1885, Birks Cornforth instituted his action in the county court of Ouray county upon the bond of Charles H. Rawles, then sheriff of that county. The bond is in the statutory form and is set out in the complaint.

It is alleged that on the 22d day of December, 1884, Cornforth obtained judgments against Stephen Pollock and others, one for the sum of \$915, the other for the sum of \$1,658; that executions were issued upon said judgments and placed in the hands of Rawles for collection; that at the same term of the court divers other executions were issued upon certain other judgments obtained by other creditors against the same parties; that Rawles collected out of the property of Pollock et al. for the use of all the attaching

and judgment creditors the sum of \$1,868.15; that in December he returned the execution into court; and thereafter and in the month of January, the clerk of the court by direction of the court estimated and computed the amounts due to each attaching and judgment creditor out of the sum so realized; that the amount due Cornforth as his *pro rata* share was \$575.50; that Rawles refused and neglected to pay over this amount, although frequently requested to do so. Demand for judgment in the sum of \$575.50 with interest and costs.

Answer and cross-complaint filed by defendants, Rawles, King and Nutter. By the answer the judgments rendered in favor of Cornforth are attacked as being fraudulent, null and void. The answer denies that any sum of money is due him under the *pro rata* distribution; admits that the clerk made the *pro rata* distribution but denies that it was upon an order of the court, and alleges that they had no notice of any application for such an order. The grounds on which the judgments are attacked are extensively set out in the second defense and cross-complaint, but we deem it unnecessary to here set them forth. No reply was filed to the second defense and cross-complaint. The record shows that certain creditors appeared by leave of the court and filed a petition of intervention, and set up substantially the same facts in their petition as are alleged in the second defense and cross-complaint of the defendants. Judgment was entered in favor of plaintiffs and the petition of intervention dismissed. An appeal was taken to the district court of Ouray county.

Thereafter in the district court a motion was filed to dismiss the action on the ground that the county court had no jurisdiction and that the plaintiff had no legal capacity to sue in the action. The motion was sustained as to the second cause and plaintiff was permitted to amend the complaint by interlining the words "The People of the State of Colorado ex rel.," before the name "Birks Cornforth." The cause was referred to a referee to take testimony, the referee filed his report recommending judgment for the plaintiff.

Motion to set aside the findings of the referee and the conclusion of law was then interposed and overruled, and judgment entered for the sum of \$823.

It appears that Charles H. Rawles, during the progress of this cause, died, and his wife, Harriet A. Rawles, as executrix, was substituted as one of the defendants.

The principal contentions of plaintiffs in error are that the action being upon a bond, the penalty of which was \$5,000, the county court had no jurisdiction, and that the district court therefore could not acquire jurisdiction on appeal; that the court erred in permitting plaintiffs to amend the complaint by inserting the words "The People of the State of Colorado ex rel.;" and that the court erred in ordering the substitution of Harriet A. Rawles, executrix, as defendant, in place of Charles H. Rawles, deceased, and in entering judgment against the executrix and the surviving defendants.

As to the proposition that the action being upon a bond, the penalty of which was \$5,000, the county court had no jurisdiction, we are satisfied that the contention is without merit. The amount of damages claimed is for a sum which is clearly within the jurisdiction of the county court.

The rule seems to be that the criterion of the jurisdiction is not the nominal amount of the penalty, or the judgment rendered for it, but the damages prayed for and the actual judgment for which execution will be issued. *Stone v. Murphy*, 2 Iowa, 35; *Murfree on Official Bonds*, par. 479, 480; *State v. Luckey et al.*, 51 Miss. 528; *Bloomer v. Laine*, 10 Wend. 525.

The amount of damages prayed for in this case and for which judgment was rendered brings it within the rule above laid down, and the fact of the suit being brought in the name of The People upon the relation of the party who is alleged to have been injured by the wrongful acts of the sheriff, does not prevent the application of the rule.

It is insisted that the complaint shows that the judgments were rendered at the September term of the court, and that

the executions were returned at the November term ; that the order of distribution under the statute was made at the subsequent January term ; and inasmuch as the complaint does not show that the money was still in the hands of the sheriff at the time of the prorating and order of distribution, the plaintiff was not entitled to judgment. In other words it is urged that, to be of any force and effect, the prorating and order of distribution must be made at the term of the court at which the judgments were entered or at which the executions were returned.

Under the provisions of the statute in existence at that time, five terms of the county court annually were provided for, and it occurs to us that this of itself argues strongly against the contention of the defendants. Besides, the executions were not returnable until ninety days from date, and this would render it utterly impossible for the court to observe the rule contended for by counsel. A writ issued at the September term, not returnable for ninety days, could not receive the consideration of the court until the January term, unless such execution was returned by the sheriff by consent of all the parties. We are clearly of the opinion that the statute contemplated that attaching and judgment creditors at the same term of court should have a *pro rata* distribution of the property attached or levied upon by virtue of writs issued at that term, and that it made it the duty of the sheriff to retain within his control the fund of the debtor until the action of the court was had with reference to the distribution of the fund so held by him among the creditors in whose interests the writs had issued. Any other rule would permit the sheriff to satisfy executions first placed in his hands, although other executions may have issued from the same court upon judgments obtained at the same term. The sheriff was under no obligation, while this statute providing for *pro rata* distributions was in force, nor could he have been compelled to pay out any portion of the proceeds acquired by virtue of such writs until so directed by the

court. He was absolutely safe in awaiting such action and could have protected himself against any liability.

In *Clafin et al. v. Doggett et al.*, 3 Colo. 418, it was held that, where two attaching creditors are, under the statute, entitled to share *pro rata*, the fact that the property attached is sold under execution issued in one case only, does not affect the right of the creditor not ordering the execution. The effect of the sale is merely to transfer the attachment lien from the property to the fund. See *Daniels et al. v. Lewis et al.*, 7 Colo. 430.

It is next insisted that the court erred in allowing plaintiff to amend the complaint by substituting the words, "The People of the State of Colorado for the use of Birks Cornforth" in place of "Birks Cornforth." By the code it is provided that the court may, on motion, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party; or a mistake in any other respect. * * * Section 75, p. 116, Session Laws, 1887. We deem this provision of the code ample warrant for the court to allow the amendment.

As to the question of fraud, the validity of the judgment, or irregularities in rendering the same, we have to say that they are not susceptible of being attacked in a collateral proceeding of this kind.

In the case of *Hughes v. Cummings*, 7 Colo. 203, the supreme court have most emphatically declared that a judgment of a court of general jurisdiction cannot be attacked except in a direct proceeding. And, by reference to this case in the same volume, page 138, it will be seen that the judgment there sought to be attacked was one rendered in the county court.

It is further insisted that there was no order of the court directing the clerk to make an estimate of the several amounts due the attaching or judgment creditors, and that no notice was given that such an assessment was to be made.

The statute provides that * * * the court shall direct the clerk to make an assessment of the several amounts each attaching or judgment creditor will be entitled to out of the property of the defendant attached. * * *

In this connection we must keep in mind the fact that these judgments were rendered in the county court, and that by virtue of the statute the judge of the county court is *ex officio* clerk thereof, and that he made the assessment of the several amounts due, and determined the sum payable to Cornforth out of the amount of money in the hands of the sheriff.

We think this objection is answered by the conclusion of the supreme court in the case of *Loveland v. Sears*, 1 Colo. 434, wherein an objection was made that the probate judge did not refer a note to the clerk to make assessment of damages as provided by the statute. The court said: "If it were necessary to refer it to the clerk, in this case, it would be handing the note by Jacob Downing, judge, to Jacob Downing, clerk, a ceremony not calculated to especially advance the spirit of justice." So also it can be said here that the judge, in making an order directing the clerk to make an estimate, would be simply directing himself to do the identical thing that the statute determined should be done by the clerk and the court. As judge he was fully aware of the existence of the judgments, and of their validity, then appearing upon the records of his court, and proceeded as clerk to make the estimate as provided by the statute. Besides, in opposition to this contention, we can say that the spirit and letter of the statute was fulfilled in this, that the court as well as the clerk acted officially in determining the amount due to each attaching and judgment creditor.

It is next insisted that Harriet A. Rawles was not a proper party to the proceedings as the executrix of Charles H. Rawles. It is evident from the record that the death of Rawles was suggested to the court. She appeared at various stages of the proceedings without objection to her being made a party, and even if no summons had been issued or no notice served upon her, the appearance made by her attorneys with-

out objection, or without limitation, precludes them from raising the question for the first time in this court.

This concludes all the points we think it necessary for us to determine. We have searched in vain for an error that would warrant a reversal of the judgment.

The judgment must be affirmed.

Affirmed.

2	508
2	475
2	508
4	492
2	508
118	166

THE BOARD OF COUNTY COMMISSIONERS OF PARK COUNTY,
PLAINTIFF IN ERROR, v. LOCKE, DEFENDANT IN ERROR.

1. PRACTICE ON APPEAL.

The objection to a complaint that it is ambiguous and uncertain cannot be raised for the first time on appeal.

2. LIABILITY OF COUNTY—WATER COMMISSIONER'S COMPENSATION.

Under sec. 2 of an act approved March 25, 1889, (Sess. Laws, 1889, p. 470,) each county into which a water district extends is liable for an equal amount of the compensation of the water commissioner.

3. PRACTICE—CUMULATIVE REMEDY.

One whose claim against a county has been presented to and disallowed by the board of county commissioners, may, under the statute (Gen. Stats., secs. 546 and 547), either appeal to the district court or bring his action at law or in equity. His right to bring an action is not excluded by his statutory right of appeal from the decision of the board.

Error to the County Court of Fremont County.

Messrs. BAILEY & WILKIN, for plaintiff in error.

Messrs. MACON & LOCKE, for defendant in error.

BISSELL, J., delivered the opinion of the court.

During the year 1889 James T. Locke, the defendant in error, performed the duties of water commissioner for Water district No. 12, which comprised parts of the counties of Park, El Paso, Custer and Fremont. Subsequently, he pre-

sented a claim to the board of county commissioners of Park county for \$97.50, being one fourth of the total sum which he was entitled to charge for the performance of his duties. The board disallowed it. Locke brought this action against the county, and recovered a judgment for the amount claimed. The performance of the work was not disputed. The county relied wholly upon two defenses set up in their answer. These were adjudged insufficient on demurrer. What they were will be fully disclosed in the discussion of the errors assigned.

The first contention is that the complaint does not state facts which constitute a cause of action. It would not subserve a useful purpose to set it out *in extenso* and demonstrate by a particular reference to its allegations its sufficiency to support the judgment rendered. It is very inartificially drawn, and lacks allegations which ought to have been inserted to make it a perfect statement of the plaintiff's cause of action. It was probably vulnerable to a demurrer under the last clause of section 50 of the Code. It was ambiguous and uncertain. Had it been attacked in this manner or by a motion to make it more definite and certain, the plaintiff would have been forced to amend or he could not have gone safely to trial. But there is enough to uphold the judgment. To make such an objection available in an appellate tribunal after a trial and judgment, there must be a substantially complete failure to state the facts which make up the plaintiff's cause of action. This case does not come within the rule. A cause is stated, inartistically without doubt, but substantially, and sufficiently, when aided by a verdict, to dispose of this objection.

The county set up that the services rendered were performed about the sources of the water supply and outside of the limits of Park county. It was then insisted that since the act provided that each county should pay its *pro rata* share of the wages, the recovery must be limited to the sum which the proof showed was the value of what was done within the boundaries of Park county. The whole trouble

arose from the change in the phraseology of the statute by the amendments to the act of 1885 in the Session Laws of 1889, page 470. Prior to the amendatory act of 1889, no question could have arisen as to the obligation of Park county to pay the one fourth of whatever the commissioner was entitled to charge, because by the terms of that act each county was bound to allow to the commissioner an equal part of his compensation. The act of 1889 provided that each board of county commissioners should pay the water commissioner its *pro rata* share of his wages. It is insisted that this change in the phraseology has furnished a different basis upon which the compensation must be computed with reference to the liabilities of the counties. No such necessary result follows from this change. The amendment related particularly to the time which the water commissioners were entitled to devote to their labors, and the compensation which they might receive. The amendatory act likewise largely concerned the power of the commissioner to appoint assistants, the regulation of their wages, and imposed upon the water commissioner the duty of devoting his entire time to the performance of the functions of his office. Since the act principally and largely concerned other matters than the simple distribution of the liability of the different counties to pay for what was done, it violates no rule of statutory construction to hold that there was no manifest intention on the part of the legislature to alter the method of ascertaining the extent of this obligation. The inconvenience and uncertainty attending any other mode of computation than the simple division of the sum total which the commissioner receives by the number of counties comprising his water district, and the failure of the legislature to provide any other scheme, in terms or by necessary implication, leads to the conclusion that the responsibility of the counties was entirely unaltered by the amendment.

The only other proposition seriously argued by counsel, and the one concerning which there might under some circumstances be grave differences of opinion, relates to the right

of the officer to bring an action directly against the county after his claim has been disallowed by the board of county commissioners. On this proposition there is in the cases considerable contrariety of adjudication. The differences, however, mainly arise from the phraseology of the statutes regulating these matters. On the general question there seems to be but little disagreement. It is almost universally conceded that courts of justice are the proper tribunals for the final adjudication of controversies, whether between citizens, or between citizens and corporate bodies. The intention must be evident to deprive the citizen of his ordinary right to resort to the courts. Wherever there is anything in the statutes which justifies a different conclusion, the courts of this state have never hesitated to hold that a remedy is not exclusive if it divests the citizen of his right to bring his action in the usual manner. *Park County v. Jefferson County*, 12 Colo. 585; *School District No. 3 v. Hale*, 15 Colo. 367.

It is provided by section 547 of the General Statutes of 1883 that, whenever any claim shall be disallowed by the board of county commissioners, the person aggrieved may appeal from the decision of the board to the district court of the county by taking the steps designated by that statute. It is claimed that this section provides an exclusive remedy, and in the interests of that governmental body deprives a party of any right to maintain an action on the claim thus in a manner adjudicated. The force of the argument in favor of this proposition is very largely destroyed by the amendatory act of 1887, page 240. Section 546 of the General Statutes of 1883 was entirely superseded by a very voluminous section covering many matters not included in the original section thus numbered in the chapter. It commences: "All claims and demands held by any person against a county shall be presented for audit and allowance to the board of county commissioners of the proper county in due form of law before an action in any court shall be maintainable thereon. * * * " This section is immediately followed by sec-

tion 547 which provides for the right of appeal to the district court of the county. When the two sections are thus read together it is manifest that there would be no significance to the limitation contained in section 546, if the construction contended for was given to the language of the one following. Under the general scheme provided for the county government and for the management of its affairs, the boards of county commissioners are clothed with authority to settle and adjust all claims, and to pay by warrant such as may be allowed. Those which may be disallowed are necessarily subject to litigation of some sort as between the parties. Obviously it would rarely happen that a right of action would exist in favor of a creditor prior to the presentation of his account to the county officers for allowance and settlement. If it had been the intention of the legislature by the language of section 547 to exclude any remedy to the claimant other than the right of appeal, and the amendatory act of 1887 had reference only to that very small class of cases where a right of action would exist prior to the presentation of the account to the county officials, the legislature would doubtless have broadly provided that all claims against a county must be presented to the board of county commissioners for allowance and settlement, and that no action at law with respect to any such matters should ever be brought against the county. Such would be the inevitable result of a construction holding that the right of appeal was the only remedy open to one whose account or claim against a county had been disallowed. There is such evident inconsistency in the phraseology of the two sections, if the word "may" is held to mean "must," that we are not justified in holding the remedy by appeal to be exclusive. It is rather a concurrent remedy, and the party aggrieved has a right to pursue it, or in a proper case to bring his action at law or in equity, as he may be advised.

The record discloses no errors necessitating a reversal of the judgment in this case, and it will accordingly be affirmed.

Affirmed.

THOMAS, PLAINTIFF IN ERROR, v. THE PEOPLE OF THE
STATE OF COLORADO, DEFENDANTS IN ERROR.

CRIMINAL NEGLIGENCE.

Criminal responsibility will attach for the grossly negligent performance of a lawful act, but the neglected duty must be a plain one concerning which there is a general consensus of opinion, and the party charged must have been under some contractual or legal obligation to perform that which he omitted to do, and the omission to perform it must have been so grossly negligent that the law will impute criminal intent.

Error to the Criminal Court of Arapahoe County.

Mr. T. M. PATTERSON, for plaintiff in error.

Mr. J. H. MAUPIN, attorney general, for defendants in error.

BISSELL, J., delivered the opinion of the court.

D. G. Thomas was jointly indicted with Fay and O'Hara for the killing of four men in December, 1888.

It is now quite universally conceded that there may be a criminal responsibility for the grossly negligent performance of a lawful act. Law writers and jurists agree as to what must be disclosed by the proof in order to hold an individual criminally liable for the death of another, when aside from considerations of negligence the act would otherwise be lawful. When the defendant is accused because of his neglect to do a particular thing the duty must be a plain one, requiring no discussion to establish its obligatory force, and concerning it there must be a general consensus of opinion. It is likewise essential that the party charged must be obligated to do what he omitted to perform by the terms of some contract by which he is bound, or the law must have cast on him the obligation of performance. *United States v. Knowles*,

4 Sawyer, 517; *Reg. v. Hughes*, 7 Cox's Criminal Law Cases, 301; *Rex v. Green*, 7 Carr. & P. 155 (32 Eng. Common Law, 548, 549); 2 Wharton Criminal Law, § 1002; Cooley on Torts, p. 84.

Manifestly the proper resolution of the present inquiry mainly depends on an accurate ascertainment of what Thomas was bound to do, the extent of that obligation and what negligence, if any, was exhibited in his acts.

In December, 1888, The Denver Gas Company, a corporation operating in the city of Denver, was engaged in relaying its pipes along 15th street. Before this company commenced its work, the Denver Tramway Company, which was also a corporation operating in the city of Denver, had constructed a line of cable railway along that street. This cable road had been built in the ordinary way. The slot line through which the grip runs, and the surface rails along which the wheels move, rested on iron yokes bedded in cement, with the usual sewer pipes and drip boxes connected. Above the cement bed in which the yokes rested, and which was the basis of the structure, the course of the road had been filled with earth to the surface, and it was paved between the rails. This structure covered the gas main as it was laid beneath the surface for a portion of its general circumference. The gas main was from one to two feet below the bottom of the cement bed. To overcome the difficulties readily apparent from this situation, the Gas Company commenced to move the pipe and to place it outside of the line of the railway, presumably for the purpose of safety and convenient repair. It is not apparent from the testimony whether the plan adopted for the change was determined on by the governing board of the corporation, or whether it was left entirely to the superintendent and managing engineer Fay, who was a codefendant. Whichever is true, this fact remains: that the execution of the plan and the mode of doing the work was left to his sole determination, and was executed directly under his orders. Thomas had nothing whatsoever to do in any of these particulars. The removal

of the pipes was accomplished substantially in this wise :—A long trench some two and one half feet wide was dug along the line of the railway, and outside of a perpendicular produced by a line running at right angles with the surface of the tracks to the required depth. The work had been done for quite a long distance on 15th street without misadventure or mishap. At the time of the act, which is charged to have been a felonious killing, a trench of this description had been run between Tremont street and Court place on 15th street for a distance of probably 150 feet. As is usual in such cases, the work was done by a large gang of men distributed along the line who worked in sections of from eight to ten feet, as they might happen to lay out their own work ; each man taking about the same amount. The trench was not of uniform depth. It was quite superficial at one end, and at the other it varied from four to five and one half feet. The cars were running while the trench was being dug. It was an uniform practice, however, for the men to leave the trench whenever a car was passing.

We now come to the point concerning which there are more serious differences in the testimony than concerning any other one proposition of fact in the case, and that is, as to the extent, if at all, to which the digging had been carried underneath the cement bed of the railway, in the direction of the location of the gas main, and towards the center of gravity of the superstructure. We conclude from the testimony that very little digging had been done in that direction. The pipe was exposed in a few places along the trench as a result of the explorations which were made by the men to find out just exactly where the gas main was. The main, however, was not exposed for any considerable portion of its surface, nor for any considerable distance along the line. It was only for short distances and for small spaces that these prospecting holes had been run by the workmen. It is evident to our minds, as it was to the minds of the engineers who testified, that there was no such amount of digging underneath the superstructure of the railway as would be liable,

in the judgment of any prudent man, to jeopardize the safety of that structure. While this conclusion is fully sustained by the testimony of the witnesses both for the people and for the defendant, none of whom dispute it, it was and is probably an erroneous deduction, since this happened: After the passage of the last car preceding the accident, the entire railway structure, from the cement bed to the surface, careened from its location to the further bank of the trench, and at the point of the greatest bend caught and killed four men.

This statement of facts plainly suggests the accuracy of the antecedent suggestion as to the question to be resolved. To fasten any criminal responsibility upon Thomas it is indispensable to demonstrate that he omitted to do something which he ought to have done, or that he did that which he should not have committed, in such a grossly negligent way that the law would impute to him the criminal intent, which is the essential ingredient of all crime. This cannot be done. Taking the two elements in the inverse order, Thomas did no act which resulted in the killing. It was not shown either that he was negligent in the direction of the construction of the ditch, nor that anything which he did with reference to that construction was negligently done, and that from such negligence the accident resulted. In the first place it was not in evidence that he was directed to do what, if done, would have protected the workmen, and that he failed to do it, or did it in a negligent fashion. In this connection it may be broadly stated that Thomas was intrusted with the determination of nothing which concerned the construction of the ditch. The plan was devised, its mode of execution determined on, its location fixed, its depth and method of construction settled, by the engineer and managing superintendent, Fay. With none of these things did Thomas have aught to do; he was simply a gang boss intrusted with the naked execution of his principal's orders and without any discretion with reference to any of the particulars of that

execution. It is clear then that Thomas cannot be held because of any performance, negligent or otherwise.

It only remains to determine whether Thomas omitted to do anything which he ought to have done, and for which omission he can be charged with the gross negligence essential to the commission of the crime. The evidence discloses nothing. It was not in evidence that he had received orders from Fay to do what might, if executed, have probably contributed to the safety of the workmen, nor did it appear that the adoption of any other plan for the removal of the pipes, or the construction of the ditch, would have tended to the probable greater safety of the employees. Of course it is evident that if the ditch had been dug in shorter sections, and had been braced at short and repeated intervals, the lamentable result would not have happened. But it was not shown that orders to do any of these things were given to Thomas, that he failed to execute them or executed them negligently, nor was it shown that there was left to him any such discretion as would have warranted that method of performance on his part. In other words, it may be well said that according to the testimony Thomas did what he was told to do and that only; that he executed his orders with fidelity to his employers, and without any such negligence on his part as raises the necessary presumption of a criminal intent.

Upon either of the propositions suggested, it is evident that this conviction cannot stand. The relations which Thomas bore to the work were such as to necessarily preclude any possibility of criminal responsibility, unless evidence be produced which shall demonstrate that he received orders which he failed to execute, or executed with such gross negligence as to cast on him a liability for the death of the unfortunate men who were killed.

Numerous other errors are assigned and argued by counsel for the plaintiff in error, some of which would of necessity compel a reversal of this judgment of conviction. Those which are at all important rest upon erroneous instructions as to the law given by the court. It would be useless to

prolong this opinion for the purposes of discussing the assignments of error based on them. They consist mostly of inaccuracies in phraseology and the statements of rules which are inapplicable to trials of this description, and are not likely to be followed or overlooked should any further action be taken in the case.

Since the judgment of conviction is unsupported by the testimony and by the law, the judgment must be reversed.

Reversed.

REED, J., not sitting.

REDDIN, APPELLANT, v. DUNN, APPELLEE.

1. FRAUD.

A conveyance obtained fraudulently and deeds executed by the conspirators in furtherance of the fraud will be canceled at the suit of the party defrauded, and this result will not be prevented by a voluntary conveyance by the conspirators to one who had no actual knowledge of the fraud.

2. CONSTRUCTIVE NOTICE.

A knowledge of facts sufficient to put a prudent person upon inquiry, is constructive notice of all facts which might have been ascertained by such inquiry or investigation.

Appeal from the District Court of Arapahoe County.

ON the 1st of January, 1889, Sarah Dunn (appellee) was the owner of a tract of land adjoining the town of Yuma, Washington county, a part of which had been subdivided into lots, some of which had been sold. It appears that she was addicted to drinking, becoming intoxicated at times, whenever a favorable opportunity offered. Knowing this fact, one James W. Brown, who kept a house of ill fame, on the evening of January 3, 1889, at 7 or 8 o'clock, with a woman claiming to be his wife, visited Mrs. Dunn, the Brown woman carrying with her a bottle of whisky and a box of cigars. The three, at least ostensibly, started in to have a

good time, and destroy the contents of the bottle; Mrs. Dunn, with an appetite that needed no prompting, but nevertheless being prompted by the benevolence of the Brown female. When the absorption of the fluid was generously and satisfactorily under way, Mr. Brown left the house, leaving the woman to manipulate Mrs. Dunn, if any manipulation was necessary. Some time during the evening Brown returned, and with him Granville E. Pendleton, said to be an attorney at law, who had formerly been consulted by Mrs. Dunn in regard to her legal matters. Mr. Brown informed her of some threatened lawsuit that might endanger her title to her land. Mrs. Dunn spoke of a suit in regard to a sewing machine, also to be brought, and desired Pendleton to defend her. Mr. Pendleton advised that she "put the land out of her hands" until the lawsuits were over, assuring her that Brown and he would see that she was not beaten out of it. Brown and Pendleton, finding matters working satisfactorily, left about 10 o'clock, and went up town. Some time after, same evening or night, they returned, bringing with them one Hampton, a notary public. A warranty deed was presented to Mrs. Dunn, which was by her executed, conveying all her land, including town lots, to the man Brown. It is not claimed that any consideration passed. Subsequently, Mrs. Dunn, having recovered from her debauch, became alarmed in regard to what she had done; also threatened the parties connected with the conveyance with criminal prosecution. Thereupon, to adjust the matter, Pendleton drew up the following paper: "This agreement, made this 8th day of January, 1889, by and between James W. Brown and Sarah Dunn, of the town of Yuma, Washington county, Colorado, witnesseth, that whereas, James W. Brown has bought certain real estate of Sarah Dunn adjoining the town of Yuma, Colorado, [description of property:] Now, the said Brown agrees to hold said land under the deed which he has, and he agrees to sell such lots as he can, and keep a just and true account of all such sales and amounts derived therefrom, and to properly account for

the same from time to time, as occasion may require ; and it is further agreed that any time when these parties to this agreement shall agree among themselves to make out any new deeds to or for this land, that the same can be done at such time as these parties may agree upon, and on any such terms as may be satisfactory to themselves. It is further agreed that a just and proper account shall be kept of all sums of money that may be paid by the said James W. Brown to the said Sarah Dunn, or her order ; and the same is to be properly accredited to the proper party. James W. Brown agrees to keep, fulfill, and perform all the agreements that he has made herein regarding the property in question, and to make such settlements, from time to time, as may be proper and satisfactory to the parties to this agreement. Given under our hands this 8th day of January, 1889, at Yuma, Colorado. [Signed] JAMES W. BROWN. [Signed] SARAH DUNN. Witness: ROSA TOTTEEN." It also appears that there was one John M. Abbott residing in the same town, claiming to be an attorney at law, who prior to and at the time was the legal and confidential adviser of Mrs. Dunn, in whom she had full confidence. Him, it appears, the parties Brown and Pendleton found it necessary to placate in order to carry out their plans. He appears to have taken kindly to it, and to have been readily placated. There was also one John H. Reddin, claiming to be an attorney at law, who claimed to have some rights against the land of Mrs. Dunn, which he had been trying to, or threatened to, enforce. His acquiescence and co-operation became important, and he was initiated. These preliminaries having been successfully arranged, on the 12th day of January, nine days after the execution of the deed by Dunn, and four days after the execution of the contract, Brown, Pendleton, Abbott, and John H. Reddin met, and proceeded to distribute and administer the real estate of Sarah Dunn. A number of lots were conveyed by Brown to Abbott, a number by Brown to Nancy E. Pendleton, wife of G. E. Pendleton, and the balance to John H. Reddin ; and on the same date, and at the same

time, John H. Reddin conveyed to William G. Reddin the property conveyed to him (John H. Reddin) by Brown. Pending these transactions, and while details were being arranged, it appears G. E. Pendleton and Brown entered upon some negotiations in regard to the residence, furniture, piano, etc., of Brown, which transaction culminated at the same time Brown concluded his conveyance of the Dunn property, by which Nancy E. Pendleton succeeded to the estate, real and personal, of Brown in the town of Yuma, and Mr. Brown, Mrs. Brown, the dispenser of cigars and whisky, and the "maid servants" who assisted in occupying the house, precipitately left the country. In all these transactions it is not claimed, nor attempted to be shown, nor is there any pretense, that any consideration whatever passed, except as between John H. Reddin and Brown. John H. Reddin paid Brown, cash, \$1,250; claims to have been an innocent purchaser for value, and poses as a victim. Abbott and Pendleton do not claim to have paid for the property conveyed to them, respectively, but claim that they had earned it as "commissions" in the transactions. After the parties had got through with the distribution of Mrs. Dunn's estate, she conveyed an interest in it to one John Whitly, or, rather, to her attorneys, who conveyed to Whitly. Dunn and Whitly brought suit against the various parties, asking that the conveyance of Mrs. Dunn to Brown, and from Brown to his various grantees, be canceled, and all the transactions pertaining to the property be declared void. William G. Reddin was the only defendant that answered. He did so at great length, traversing the allegations of the complaint relating to himself, claiming to be an innocent purchaser for a valuable consideration, etc. An extended trial was had to the court, resulting in a finding and decree for the plaintiffs that each and every of the deeds were void, and awarding judgment for costs, from which judgment and decree an appeal was taken to this court.

Mr. JAMES H. BROWN, Mr. ROWE MILTON SMITH and Messrs. REDDIN & O'HANLON, for appellant.

Messrs. SULLIVAN & MAY, for appellee.

REED, J., after stating the facts, delivered the opinion of the court.

Comment upon the character and facts of the case is unnecessary. If a judge had the ability to do justice to it by the use of our language, it would only be misdirected energy. A more marked case of bungling, stupid conspiracy to rob a drunken, ignorant woman, and divide the proceeds, cannot be found in court records. The case of the individual who was traveling from Jerusalem to Jericho, "and fell among thieves, who robbed him, stripped him of his raiment, and departed, leaving him half dead," was mild in comparison. That was not done by members of the legal profession, nor by pretended friends. That transaction appears to have been open and manly, in the ordinary course of business, where hypocrisy, whisky and female influence were not involved. I trust I may be pardoned for discussing that case instead of the one under review, as it is a more pleasant case. The inequitable distribution of Mrs. Dunn's property is apparent. Each of the parties, except the owner, had a part of it; she alone was left out. It is not shown that she was stripped of her raiment, but her wardrobe may not have been desirable. There is no attempt on the part of the original conspirators at justification, no attempted assertion of legal title to the premises, nor any pretense that a consideration was paid. The pretended contract executed by Brown and Dunn, after Dunn had got sober and realized her situation, is, if possible, more iniquitous than the original transaction, made to pacify her, and prevent exposure until the scheme could be carried out. William G. Reddin, grantee, as pretended, of John H. Reddin, one of the originals, is the only one who saw fit to defend, and is the only appellant. The validity of his title to the land is attempted to be predicated upon the supposed fact that he was an innocent purchaser for value, without notice, and that, as such, he could take, regardless of the

fraud by which his grantor acquired his pretended title. In order to determine this question the court is confronted with a printed abstract of 156 pages, 24 assignments of error, and a brief and argument of appellant's counsel of 62 pages. No briefs or arguments are filed upon the part of appellee. The industry, research, and ability of counsel for appellant in presenting the case are eminently praiseworthy, though perhaps misdirected.

Passing briefly over the earlier contentions of counsel in the argument, we find some 15 pages upon the proposition that there was no sufficient evidence of fraud. Numerous authorities are cited upon the proposition "that fraud cannot be presumed, but must be proved like any other fact." There is no question of the legal correctness of the proposition. In view of the facts, conceded and testified to by the conspirators themselves, the attempted subdivision and distribution of the estate by deed, followed by the immediate absconding of one of the principal actors, an attempt to justify the transaction, and establish the honesty and *bona fides* of it, seems rather an undervaluation of the intelligence of the court to which the argument is presented.

The next proposition sustained by an elaborate brief is to the effect that there was not sufficient evidence to impeach the acknowledgment. This is also misdirected legal energy. That there was no conveyance, no acknowledgment, or any other element of legal conveyance is not only apparent from the undisputed evidence in regard to the circumstances, but is legally and tacitly conceded by the making and execution of the contract of the 8th, in which Dunn, by her supposed friend and legal adviser, Pendleton, is imposed upon again, and made to believe that the former conveyance is abrogated, and she reinstated in her ownership, with Brown as her agent to sell. The making of the contract alone, regardless of other evidence, is sufficient,—a confession of the fraud that had been perpetrated.

The next proposition is that the court erred in decreeing the deed by Dunn to Brown, and from Brown to John H.

Reddin, and from him to appellant, to be canceled, for the reason that Dunn could not rescind, as she had not placed the parties *in statu quo*. I hardly think I should have the patience, or make any attempt, to examine the contention, if counsel had not made it, evidently in good faith, supported it by supposed authorities, and regarded it as tenable. It is not contended that Dunn received anything whatever from any of the parties. It is contended that John H. Reddin had a claim of \$1,000 against the divorced husband of Dunn, for legal services, which he hoped to enforce against the property of Mrs. Dunn, and with that intention had an attachment levied upon her property, which proceedings were pending and undetermined at the time of these transactions, and that, after the conveyance by Brown of Mrs. Dunn's property to him, he dismissed his attachment, and lost his lien; hence Mrs. Dunn could not rescind without placing him *in statu quo* as to that, as the dismissal of the attachment was voluntary, for the supposed benefit to himself and his worthy partners,—a matter in which she in no way participated, or was shown to have had any knowledge. Counsel fail to inform us what Dunn should have done, or was either legally or morally required to do, in the premises. There was no privity between Reddin and Dunn except through Brown. The consideration from Reddin, if any, went to Brown, his grantor, not to Mrs. Dunn. It is also contended that John H. Reddin paid Brown in cash \$1,250, with which he absconded, and that Mrs. Dunn could not rescind without returning that money to Reddin. The absurdity of the claim as a legal proposition is so apparent, upon a bare statement of the premises, that the only wonder is that counsel should seriously attempt to maintain it.

This brings us to the consideration of the only important question in the case, which may be very briefly disposed of, viz., whether the Reddins were innocent purchasers for value. John H. was familiar with the property; had been mixed up in the affairs of the Dunns, husband and wife; and, at the time of the transactions in question, had an attachment

upon the land for a demand against the husband. Pendleton appears to have been the active, moving agent throughout the whole affair, and for such participation his wife, at his instance, received quite a number of Dunn's lots; also succeeded to all the tangible estate of Brown when it was thought advisable for him to leave the country. After he had succeeded in getting Dunn to convey her entire property to Brown, it was necessary to clear off the cloud of John H. Reddin on the title, and find a purchaser. Pendleton succeeded in doing both by bringing Reddin into the combine upon his own terms of compromise. To say he was not initiated fully would be to contradict not only his confederates, but all the facts and circumstances of the case. He was present at the general distribution; took what was left of the estate after the claims of Pendleton and Abbott, complacently christened "commissions," had been satisfied. His presence and participation in the matter at Yuma and Akron were incompatible with his claim of innocence. If the facts and circumstances stated were not conclusive in regard to his full knowledge of, and complicity in, the fraud, prior to and at the date of the attempted distribution, his immediate reconveyance of the property at the same time and place, and under the circumstances narrated by himself, is sufficient to convict him. His brother William G. Reddin, a conductor on the Burlington road, was not present; knew nothing about his purchase of the property on that day, or in regard to the property; had some \$600 or \$700 on deposit with the firm of which John G. was a member. He would see his brother that night; did not wait, but thinking it would suit him, conveyed it, and left the deed for record, with orders to have it sent to William G. On his return to Denver that evening, saw his brother, and, on the platform at the depot, sold it to him, taking the \$600 in the firm, and subsequently the note of William G. for the balance, which had not been paid at the time of the trial. The pretended consideration was \$2,300, made up as follows: Claim against the male Dunn, \$1,000 (for which he had on

the same day offered to take \$500) ; cash paid Brown, \$1,250 ; his trip to Yuma and Akron, \$50,—aggregate, \$2,300. “ He only wanted to get out even.” To get even he makes the trade *solus* ; gets his brother to ratify his conveyance ; takes \$600 cash in place of \$1,250 cash paid out, and the Dunn claim, \$1,000 ; takes the note of his brother, payable six months after date, for \$1,700, without security upon the land or otherwise,—a very peculiar business transaction for a man whose only anxiety was to get out the money he had put in on the same date. The whole case of William G. Reddin rests upon the testimony of his brother John H. William G. was not sworn. The court was justified in disregarding the entire testimony of John H. ; it was utterly unworthy of credit. This disposes of the contention that John H. was an innocent purchaser without notice. It is unnecessary to invoke or apply any principle of law in a case like this. All that is necessary to dispel the illusion is the statement of the universal and undisputed rule in regard to notice. It is not even necessary that the grantee should have actual knowledge of the fraud. “ What would be constructive notice * * * may be said to be a knowledge by the purchaser of some facts which would put him upon inquiry, and require him to examine other matters that would generally unfold the true title.” 8 Wash. Real. Prop. 328.

In regard to the claim of William G. Reddin, it is only necessary to say that he was not a purchaser at the time of the conveyance. It was not a voluntary conveyance by John H., in which he in no way participated. The transaction lacked other elements indispensable to render it valid,—there was no consideration, delivery, or acceptance of the deed. Subsequent ratification was attempted to be proved by John H., but the testimony was too weak to establish it. So far as appears from the record, William G. was only a passive convenience in the hands of his brother. It is not shown that he ever personally asserted any right or claim whatever. He wisely kept himself from any active participation. The only criticism of him that can be indulged in

is in his allowing the use of his name to assist in the consummation of one of the most deliberate frauds ever brought to the attention of a court. The decree of the court below, canceling all conveyances, and branding the entire transaction with the mark of its true character, was correct, and must be affirmed. Courts of equity do not lend themselves as agents to perpetrate fraud and robbery, or to assist parties in retaining the proceeds.

Affirmed.

BROWN, APPELLANT, v. HUNTER, APPELLEE.

REDEMPTION—VOID SALE.

A judgment creditor who has paid money to the sheriff for the purpose of redeeming property from a sale may, upon ascertaining that the sale was void, recover the money so paid, in an action against the sheriff commenced while the fund was still in his hands.

Appeal from the District Court of Custer County.

Mr. R. D. THOMPSON, for appellant.

Mr. JOHN R. SMITH, for appellee.

BISSELL, J., delivered the opinion of the court.

The present suit is the outgrowth of the various actions between the Bassick Mining Company and its creditors. In 1885 one Schoolfield commenced a suit against the company to enforce a lien against the property of the corporation, and therein one James W. Kurtz was appointed receiver of all its estate and property. Divers other persons became parties, claiming liens on various grounds, and the action proceeded to judgment, decree and sale. After the sale, and the distribution of the funds, the receiver rendered his accounts to the court, was allowed his compensation and discharged

from any further execution of the trust. Notwithstanding the decree of final settlement, the receiver continued in possession of the property, and some months after made an application to the court for a further allowance by way of compensation and reimbursement for expenses. The application was allowed and by order of the court passed into the form of a judgment, on which an execution was issued, and the property again sold, and bought in by the receiver Kurtz for the sum of \$3,315.15. After the purchase by Kurtz under his pretended judgment, the plaintiff Brown, assuming that the judgment was binding and valid, attempted to redeem under the statute regulating redemptions from judgment sales, and paid to the sheriff, to effect that end, the sum for which the property had been sold to Kurtz. About the time the money was paid to the sheriff, Brown became satisfied that the Kurtz judgment was void, the sale worthless, and that he had acquired nothing by reason of his attempted redemption, and he brought this suit against the sheriff to recover the money. Nothing further is necessary to a complete understanding of the conclusion at which the court has arrived. We are relieved from the necessity to discuss the invalidity of the Kurtz judgment, since that question was fully settled in the case of *The Bassick Mining Company v. Schoolfield et al.*, 15 Colo. 376.

Since the decree or judgment in favor of Kurtz was without validity, there remains but practically two questions to be settled in this case. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The defects, if any, were in its averments as to the invalidity of the judgment. It was not open to the objection. Greater fullness of statement would probably have tended to clearness and certainty, but its averments were not lacking in what was essential to the statement of a cause of action, and under it the plaintiff could have made proof of everything necessary to show that the judgment was without legal force.

The other inquiry concerns the right of the plaintiff

Brown to maintain an action to recover the money paid for the purposes of a statutory redemption from a sale under a void judgment. On principle there would be no difficulty in the case. Originally Brown commenced a suit to obtain an injunction restraining the sheriff from paying the money over to the judgment creditor Kurtz, and to compel him to return what had been deposited in his hands. The court declined to entertain jurisdiction of the suit in the form in which it was brought, or to grant the relief which was sought in that bill, but retained the writ until Brown should have the opportunity to institute a suit against the sheriff to recover his money. During the life of the injunction this action was brought. It appears by the complaint that the money is still in the hands of the sheriff.

There is a well recognized difference between the rights of a purchaser at an execution sale where the process is voidable, and where some interest which the defendant has passes to the purchaser, and those wherein it is made under a void judgment whereby the purchaser acquires nothing by his bid. Under these latter circumstances it is very generally held that the sale transfers no right. *Barrett v. Churchill*, 18 B. Mouroe, 387; *Thrift v. Frittz*, 7 Brad. 55; *Boykin, Exr., et al. v. Cook*, 61 Ala. 472; *Burns v. Ledbetter*, 56 Tex. 282.

The purchaser under these circumstances, according to the authorities, can pursue either one of the two remedies which are necessary to preserve his rights. He may resist the payment of the purchase money if it has not been paid, or he may recover it as upon a contract without consideration if he has parted with the price.

The redemptioner seems to occupy precisely the same situation. The attempted redemption from a void sale brings no right to him who exercises the privilege. The creditor under the void judgment is certainly not entitled to the money, for he acquired nothing by his purchase, and there is nothing which can be transferred derivatively from him to the redemptioner. The redemptioner should therefore be

entitled to recover his money, either from the sheriff in whose hands it is, or from the creditor, if prior to the suit it may have passed under his control. In this case the money was still with the sheriff, and the action was properly brought against that officer to recover what was paid on the redemption. Rorer on Judicial Sales, §§ 925 and 1195; *Keeling v. Heard et al.*, 3 Head. 592; *Mulvey v. Carpenter et al.*, 78 Ills. 580; *Borders et al. v. Murphy*, 73 Ills. 81.

In sustaining the demurrer to the complaint the court erred, and the judgment is accordingly reversed.

Reversed.

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HOWELL, APPELLANT, v. COOPER ET AL., APPELLEES.

MANDAMUS.

Mandamus lies against the military board to compel action upon a matter properly brought before it, but not to control discretion.

Mr. C. A. LOTT, and Mr. GEORGE A. SMITH, for appellant.

Mr. J. H. MAUPIN, attorney general, and Mr. H. B. BABB, for appellees.

BISSELL, J., delivered the opinion of the court.

During the late unpleasantness sometimes called the "Ute War," one Moses L. Howell furnished the military authorities of the state with 26 horses, which were used in repelling the invasion of the hostile tribe. The horses were delivered under what is called in the pleading a "contract" which was executed by Howell on his own behalf, and by Chapman, an assistant adjutant general, who assumed to act for the state. The state exercised the option granted by the vendor, bought the horses, and paid for them. The paper contained a clause which substantially provided that, if the state should use the horses for any time prior to purchase,

Howell should receive a compensation of two dollars per day per horse for the time during which they were used. The horses were in service 27 days before they were paid for under the option. If the agreement were a legal and enforceable one, Howell would be entitled to recover \$1,404. When the state paid the purchase money, Howell's right to insist on the price named for the hiring was not waived by his acceptance of the warrants by which it was settled. After the war was over, Howell made out a claim against the state for the \$1,404, presented it to the adjutant general, who approved it, and then laid it before the military board for their action. This board seems to have done nothing with it; at least, the petition and alternative writ state that the board declined to act on the claim. Failing to secure favorable action in the matter, Howell filed his petition in the district court of Arapahoe county to procure a *mandamus* against the members of that board. The petition and the alternative writ present a double aspect. The petitioner seeks to compel a particular action on the part of the board, and likewise to compel them to act in the premises as auditors on behalf of the state. The board demurred, the demurrer was sustained, and the proceeding was dismissed.

The constitutional independence of the three departments of our governments, both state and national, has been a fruitful source of judicial discussion from the very earliest times. By far the larger part of the controversies has resulted from the absence of a forum in which the citizen might litigate his disputes with his own government. While there has been considerable difference among the courts with reference to the powers of the judiciary to control executive action, it has, ever since the decision by Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch 137, in 1803, been pretty generally conceded that executive action, which is purely ministerial in its character, and requires the exercise of no political authority or discretion, may be controlled through the high prerogative writ of *mandamus*. The chief inquiry is always whether the act which the relator seeks to

compel the executive to perform is purely ministerial, or one with regard to which he is clothed with power to exercise his judgment and discretion. The reasons and arguments on which the rule rests have been so recently expressed by our own supreme court that it would seem an act of supererogation to restate them. It is enough to announce the rule, and to follow what has been heretofore so well declared. *State v. Chase*, 5 Ohio St. 528; *People v. Brooks*, 16 Cal. 11; *Bryan v. Cattell*, 15 Iowa, 538; *Magruder v. Swann*, 25 Md. 173; *Greenwood Cemetery Co. v. Routt*, 17 Colo. 156.

The only matter to determine in this branch of the case is whether the relief which the relator sought would result in compelling the military board to do an act as to which they were clothed by the statute with discretion. Of this there can be but little question. The military board consists of the commander in chief, who is the governor, the adjutant general, the inspector general, and judge advocate general, and the senior brigadier general, commanding the military forces of the state. Vouchers for military expenses are to be paid by the adjutant general upon settlement and audit by that board, and thus only. There is no statutory authority conferred upon the military officers who may be engaged in the field to bind the state for the supplies which they may procure, nor for the material which they may require, for the troops. The only plan marked out by the statute contemplates the issuance of vouchers by the officers to whom the supplies may be furnished, the settlement of these accounts by the military board, and their ultimate payment by the adjutant general. Evidently the duty imposed upon that board is that of determining the character and extent of all proper claims against the state. There is no appeal from such decision, and no mode provided by which their acts may be reviewed. Under these circumstances, it is evident that the relator was not entitled to that part of the relief which he prayed, to compel the military board to audit and allow his claim. To this extent the judgment of the court in sustaining the demurrer was evidently right.

As to the other proposition involved in the controversy, the court was clearly wrong. According to the averments of the alternative writ, it appears that the military board has taken no action whatever on the claim which Howell presented in the form of a voucher issued by the officer with whom he attempted to contract. That it was the duty of the board to pass on the accuracy and correctness of that voucher, and to either allow or disallow it, is exceedingly plain. It is no answer to a proceeding by a *mandamus* against an officer who acts in a judicial or deliberative capacity to say that the thing which he is required to do calls for the exercise of his judicial power. If the writ seeks to compel him to do the act in a particular way, it is enough to respond that the act requires the exercise of judicial authority; but the officer may always be compelled to proceed to do his duty according to his best judgment, although the court will not assume to direct him how he shall decide. In the language of Chief Justice Marshall: "On a *mandamus* a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide." *Insurance Co. v. Adams*, 9 Pet. 573; *Towle v. State*, 3 Fla. 202; *Board v. Arles*, 15 Tex. 72; *Board v. Hendrick*, 20 Tex. 60. The relator, then, had the right to compel the board to take some action on the voucher which he presented. Presumably, from their failure to allow the claim, that board will reject it when they take action. The value of the remedy to which the relator is entitled in the proceedings admits of considerable question. His right to enforce action by the board is clear. Whether it is expedient for him further to pursue his right to what will probably prove to be a barren remedy it is for him to determine. It is quite possible that on the coming in of the answer by the board it will become evident that the board did act, and rejected the claim which Howell now seeks to enforce. Should this be true, it would be a perfect answer to the writ, and no further proceeding could be had, since it is well settled that the citizen cannot by this indirect

proceeding bring an action against the sovereignty in which he lives. The judgment sustaining the demurrer must accordingly be reversed, and the case remanded.

Reversed.

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THE CITY OF DENVER ET AL., APPELLANTS, v. SOLOMAN,
APPELLEE.

1. NONSUIT—WHEN JUSTIFIED.

In order to justify the court in withdrawing a case for damages from the jury, the facts should not only be undisputed, but the conclusions to be drawn from those facts indisputable.

2. SAME.

It is only where the circumstances in an action for damages are such that the standard of duty is fixed and the measure of duty defined by law and is the same under all circumstances, that the court can withdraw it from the jury.

3. CONTRIBUTORY NEGLIGENCE A QUESTION OF FACT.

Questions of contributory negligence are for the jury, and are to be determined by the facts and circumstances of each case.

4. PRACTICE.

A fact admitted by the pleadings need not be proved.

5. SAME.

An objection on the ground of nonjoinder of a party cannot be raised for the first time in this court.

6. SAME.

A party cannot assign as error an instruction given at his request.

7. ALLEGATION AND PROOF.

In an action for damages against the owner of premises for injuries sustained by reason of a nuisance thereon, the allegation of ownership is sustained by proof of a tangible and defined interest united with the control of the property, notwithstanding the legal title may be in a trustee.

Appeal from the District Court of Arapahoe County.

CERTAIN premises on Wazee street in the city of Denver are alleged to have been rented and used as livery and sale stables; Emily Middleton is alleged to have been the owner;

Leshner and Walker, lessees, in the possession and use of the property. The building was a large structure with basement, the front for the entire length being on the line of the street. In front of the building within the line of the street, extending along the front of the building, on each side the center of it, was an excavation or pit for access and light to the basement, such pit or excavation extending nearly the entire length of the building, being about five feet in width and three and one half feet in depth. There was some testimony showing that at some former time the pit was protected by some kind of a railing, but that it had been broken down or removed long previous; that there was no rail or protection of any kind when lessees went into the occupation of the premises January 1, 1889, and the condition remained the same. Across the opening and extending from the office door out on to the sidewalk was a short flight of steps, five or six in number and four feet in width—to that extent bridging the pit which was open and unprotected on each side; again, a short distance off was a bridge or driveway near ten feet in width to the doors of the building, bridging the excavation; aside from this the excavation was open, there being three different pits or openings made by the bridges, respectively, four feet, five feet, and twenty feet in length.

On the evening of Sept. 20, 1889, at about 8 o'clock, Solomon (appellee) drove into the yard, left a horse to be cared for, passed through the barn from rear to front, went out at the main door upon the carriage bridge or driveway crossing the opening, turned to the left too soon, walked off the end of the bridge, fell into the hole, and received serious personal injury; brought suit against appellants for damages sustained. Trial was had to a jury resulting in a verdict and judgment for \$841. The nature and extent of the injuries received by appellee were established by competent evidence and appear to have been practically conceded. No question is made in regard to the amount awarded by the jury as damages, hence, these questions are not involved. The complaint is in the ordinary form, alleging the injury, negligence

of the city of Denver, Emily J. Middleton as owner, and the other defendants as lessees, in allowing the pit to remain unprotected. Certain allegations of the complaint will require notice in the discussion of the case. Leshner and Walker filed demurrers to the complaint. What disposition was made of them does not appear, and it is immaterial as no exceptions were saved and the principal parties filed answers. The city of Denver, after general denials, admitted that plaintiff was properly upon the premises where the injury occurred, and that he fell into the pit, alleging that the injury received was very slight; that the pit or area way was not a defect in the sidewalk, nor one that should have been guarded by the city; that no hand or guard rail was necessary for the safety of the public in traveling along the street in front of or into the building; admits, "that a notice of the intention of plaintiff to bring suit was served upon the mayor of the city of Denver on September 13, 1889;" for a second defense, negligence of the plaintiff, his knowledge of the locality, etc. The defendant, Leshner, answered generally, admitting that he and associates were in the occupation of the premises as lessees of the defendant, Emily Middleton, alleging that the excavation was made long before his possession, and was not made by them; admits that the opening was immediately in front of the premises occupied by them, in the sidewalk, and was unprotected; alleging that the injury was not received upon the premises leased and occupied by them, but in the public street in front of the premises, and that the street was under the control of the city, etc.; second defense, knowledge of the premises by plaintiff, and that the injuries were caused by his negligence. Defendant, Emily Middleton, answered, denying the ownership of the premises, and asserting that the injury was caused by the negligence of the plaintiff, etc.

Mr. F. A. WILLIAMS and Mr. C. B. WHITFORD, for appellants.

Mr. C. HARTZELL and Mr. T. M. PATTERSON, for appellee.

REED, J., after stating the facts, delivered the opinion of the court.

It is seldom that a more troublesome and complicated case is presented for review. It will be conceded that the city, the owner of the property and the lessees were all proper and necessary parties defendant, but while necessarily so, it will at once be apparent that except upon the common ground of the contributory negligence of plaintiff, each defendant, for the purpose of shifting the responsibility, interposed and prosecuted a different line of defense, in fact, rendering joint defendants equally as antagonistic to each other as either was to the plaintiff. This condition led to great embarrassment upon the trial. The various individual issues involved were such that while almost any testimony offered might be properly admissible as between plaintiff and an individual defendant, much of it would be objectionable to codefendants. The same trouble arose in regard to the instructions of the court, and the embarrassment of the court is fully evidenced by the great number of conflicting and incompatible instructions prayed by different defendants; the great number and length of those both given and refused is such as to entail an immense amount of labor in this court in their examination alone; to attempt to reconcile and harmonize them would be equally impracticable, as it evidently was in the court below. The number of supposed errors assigned by the different defendants is rather startling, aggregating seventy-five, each assigning as erroneous all the instructions given for the plaintiff, each of the codefendants, those given by the court on its own motion and those prayed by the individual appellant and refused by the court.

The open, unprotected excavation, or area way, in the sidewalk between the front street line of the building and the street, of the character established by the evidence, was dangerous to life and limb of those who traveled the street, and such condition had existed so long that the city authorities had full knowledge of it. Not to have the knowledge, imputed such negligence as to render the city liable. By its charter the city is liable for such neglect to an individual injured, the owner of the property and the lessees are also liable.

To allow the sidewalk to remain in that situation was gross negligence, for which each and all were responsible, the owner and lessees for maintaining it and the city for failing to compel proper protection. At common law either could have been prosecuted and a recovery had without making the others codefendants. The wording of sec. 11 of the city charter (Sess. Laws, 1889) is peculiar:—"No action can be maintained against the city of Denver for damages to persons or property by reason of any defect in the streets or sidewalks of said city, which defect was caused by or was the result of the negligence of some other than an employee of the city, unless said person shall be joined with the city in the same action," etc.

It is difficult to arrive at the intention of the legislature, or proper legal construction of the paragraph. Though blindly expressed, it would seem that, where the injury was received through the negligence of a third party, and there was no knowledge of the danger, nor negligence on the part of the city, the party directly causing the injury should be joined, and if judgment was obtained, the party directly responsible should be held primarily liable and the city's liability should be secondary. It is very doubtful whether the clause can have any application in a case like the present, where the city, the property owners and lessees are all equally culpable. To so construe it, at once raises the question whether or not by reason of its departure from, and contravention of, well-settled principles of common law, and by reason of its limitations and restrictions upon the plaintiff's right to bring and maintain an action, it could be regarded as constitutional. Without determining that question, it can be safely said that it was never the intention of the legislature to compel a plaintiff to prosecute and maintain three different suits in one against three sets of *tort-feasors*, all and each equally liable; nor can it be construed, as was attempted in this instance, to impose upon the plaintiff the burden of establishing his right of action against all the parties, and at the same time adjudicate the liability and settle the equities

of the respective defendants as to each other. Admitting the statute to be constitutional and the necessity of joining all the defendants in this case, and the right of each defendant to interpose any special defense not common to all, the rights of the plaintiff remained the same, and he could be required only to maintain the respective issues which were, as to him, plain and simple; maintaining his issues against all he could take judgment against all, failing as to some, and establishing his case against others, he could have judgment against those.

On appeal to this court for review, the only questions that can be considered are those in regard to the legality of the judgments obtained by Soloman against each appellant respectively; hence, the only alleged errors that can be considered are those that go to the issues between Soloman and the different defendants. In each assignment of errors, appellants respectively assign all the instructions given upon the prayer of each of their codefendants, not only requiring the plaintiff (appellee) to maintain the correctness of those going to the issues in his own case but those given upon side issues between the different defendants. In the determination of the case these supposed errors, only of importance to the defendants, must be disregarded.

The defense pleaded and, in common, relied upon by all the defendants, was the negligence of the plaintiff. Upon the trial, extreme latitude as to evidence to establish such negligence upon his part as would exonerate the defendants was allowed. In regard to the hour the injury occurred, the amount of light, the knowledge of the premises and of the pits by the plaintiff, etc., an immense amount of testimony was directed. All the facts possible were before the jury. Elaborate instructions were given to the jury at the instance of the plaintiff in regard to the contributory negligence of the plaintiff. A careful examination of the charge fails to show it objectionable or erroneous. At the instance of the defendant, the City of Denver, numerous instructions were asked upon the question of negligence, eight of which were

given, covering every possible phase of the case; some of them far more favorable to the defendant than warranted, so much so as to modify or conflict with the charge given for the plaintiff,—notably, the fourteenth instruction given on the part of the city was too favorable, was clearly objectionable, by submitting to the jury the question of ample room for use of pedestrians on the sidewalk between the pits and the street. It had no place in the controversy. The building front being on the street line, allowing the pits in the sidewalk unprotected, was gross negligence, regardless of whether there was sufficient room to avoid them.

If such defense could prevail, the city might exonerate itself from liability by showing the other side of the street or the next parallel street safe and unobstructed. Those asked or refused were either covered by the instructions given or were properly refused by the court, not being warranted by the law. Instructions upon the same issue asked by other defendants were properly rejected, the same ground having been covered, and the subject more than exhausted, by the instructions given.

It is also insisted by all the defendants that the court erred in refusing a nonsuit on the ground of plaintiff's contributory negligence. It is a well settled rule of law in all this class of cases that, in order to justify the court in withdrawing the case from the jury, the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable. 2 Thomp. on Neg. 1236.

Cases in which the question can be withdrawn from the jury are rare. *Railroad Co. v. Stout*, 17 Wal. 657; *Railroad Co. v. Van Steinburg*, 17 Mich. 121; *Briggs v. Taylor*, 28 Vt. 183.

It is only where the circumstances of the case are such that the standard of duty is fixed and the measure of duty defined by law, and is the same under all circumstances, that the court can withdraw it from the jury. 2 Thomp. Neg., *supra*; *McCully v. Clarke*, 40 Pa. St. 399; *Railroad Co. v.*

McElwee, 67 Pa. St. 311; *Railroad v. Heileman*, 49 Pa. St. 63; *Meesel v. Lyman*, 8 Allen (Mass.) 234.

To leave the pits or man-traps unprotected, and for such great length of time, was clearly in violation of law, and the court could, as a conclusion of law, declare defendants guilty of negligence, but the accidental falling of a person into the trap cannot be so declared. In all such cases the question of contributory negligence is for the jury, to be determined from the facts and peculiar attendant circumstances of each case. See 2 Thomp. on Neg. 1178, and cases cited in notes; Whart. on Neg. 420, and notes; Redfield on Railways, 231; *Railroad Co. v. Stout*, (*supra*;) *Quimby v. Railroad*, 23 Vt. 387; *Langhoff v. Railway Co.*, 19 Wis. 516; *Weed v. Ballston Spa*, 76 N. Y. 329; *Whitaker v. West Boylston*, 97 Mass. 273; *Patterson v. Wallace*, McQueen's H. L. Cas. 748; *Briggs v. Taylor*, (*supra*;) *Railroad Co. v. Steinburg*, (*supra*).

It is earnestly contended in the argument of counsel for the city that the action could not be maintained for the want of a proper notice on the part of the plaintiff. It is provided by sec. 4, art. 13 of the city charter of 1889: "Before the city of Denver shall be liable for damages to any person injured upon any of the streets, avenues, alleys or sidewalks of the city, the person so injured, or some one in his behalf, shall give the mayor or city council notice in *writing* of such injury, within *thirty* (30) *days* after the same has been received, stating in such notice *when*, *where* and *how* the injury occurred and the *extent* thereof."

It is alleged in the complaint, "That notice of said accident, and of the intention of the plaintiff to bring this suit was duly served upon the mayor of Denver, September 13, 1889." The following appears in defendant's answer: "Admits that a notice of the intention of plaintiff to bring suit was served upon the mayor of the city of Denver on September 13, 1889." The counsel of defendant says in argument:—"The giving of this charter notice is indispensable; no action can be maintained against the city until a written notice containing all the charter requirements has been duly served,

either upon the mayor or the city council. It is a condition precedent."

In support of this conclusion there are many pages of argument and a citation of twenty-seven authorities. This clearly shows the painstaking and careful industry of counsel. Conceding the proposition, and admitting the applicability of all the authorities cited, how does it affect the case? It is alleged that the notice was given—the fact is admitted. If the notice was not in accordance with the law, the allegation should have been traversed, not admitted. A notice failing to comply with the statute is no notice. It was not reached by the demurrer, for a demurrer only goes to what appears in pleading. The notice was not set out. There is no rule of law requiring a pleader to incorporate his evidence into his pleading. Had an issue been made upon it, proof would have been necessary; then the question of sufficiency could have been determined. The admission in answer admits the legal sufficiency of the notice; hence, there was no issue requiring proof—nothing in regard to it occurred upon the trial. Its sufficiency was a question of law,—the paper was not before the lower court, nor is it before this. No exception of any kind was saved in connection with it, nor any error assigned upon any action of the court in regard to it. There is no action of the lower court to review, and neither that court nor this have or has had an opportunity of passing upon its legal sufficiency.

It is contended also in argument that the street commissioner of the city of Denver was a necessary party, and not having been joined, the judgment was erroneous. We do not think he was a necessary party, but do not find it necessary to determine the question. Neither in pleading, nor upon the trial, was the question of the necessity of joining him raised. Such claim first appears in the instructions asked of the court, and error is predicated upon the court's refusal to instruct. The failure to join him or any other defendant should have been taken advantage of in apt time, in proper manner, in the court below, so that the omission

could have been remedied, or in the language of the common law, "so as to have given the plaintiff a better writ." After issue, trial and judgment, matter in abatement is too late. Code innovation upon common law practice has never been carried to the length of allowing counsel, upon review, to set up a defense negligently waived upon the trial. There was no error of the court in refusing the instructions asked upon this point.

Of all the authorities presented not one is in point,—they are each and all, to the effect that a public officer, upon whom is cast, by virtue of his office, certain duties, may be held personally liable to an injured party for damages sustained by reason of the neglect of legal duties imposed. Admit it. The question is not whether the plaintiff could have maintained an action against the street commissioner, but whether, failing to join him, vitiated a judgment against others who were also clearly liable. Upon this question, the only one involved, no authorities whatever are presented.

Counsel for defendant Middleton insist that she was not the legal owner of the premises, but that the title was in her son as trustee. It is clearly shown that she was actually the owner, having the equitable and beneficial title and receiving the income. This in actions of this character is sufficient; a tangible and defined interest united with the control would render her liable. A nominal trustee, with no beneficial interest and receiving no income from it, could hardly be required to keep property in repair at his own expense. It is urged that the court erred in submitting to the jury the question of ownership—that it was a question of law to be decided by the court, etc. Technically this was correct, but an examination shows that the question was submitted to the jury at her request. The first instruction given by the court, at her request, submitted the question of ownership to the jury. After clearly stating the legal situation of a trustee to the property, it continues: "If you believe from the evidence that the defendant, Middleton, was not the owner of the whole, or an interest in the premises upon which the ac-

cident occurred, and was not in possession of said premises at the time of the alleged accident, you should find for the defendant," etc. She, certainly, should not complain that the question was submitted to the jury at her request and in her own language. The jury was warranted in finding that she had an "interest in the premises;" that was all that was required by the instruction to render liable. Counsel also contend that, admitting the ownership, the premises at the time of the accident were in the control and possession of lessees; that there was no evidence that they were out of repair when the lease was made, and that in order to hold the owner it was the duty of the plaintiff to make proof of such facts. Counsel are mistaken in the first statement. The testimony of the lessees established the fact that the excavation was in the same condition when leased as when the accident happened. They are also under a misapprehension in regard to the duty of plaintiff to make the proof. It was a question not involved in the issues he was required to try. It was a matter in which he had no interest whatever. As before stated, he could not be required to adjudicate issues entirely between defendants and adjust their respective liability.

The case of *Union B. Manf. Co. v. Lindsay*, 10 Brad. (Ill.) 583, cited and relied upon in support of the above proposition, fails to sustain it. First, there was no such statute as here compelling the joining of all parties. Plaintiff could elect. Second, the general exception there stated places this case outside the general rule. The court says: "The general rule of law is that the occupant, and not the owner, as such, is responsible for injuries received in consequence of failure to keep the premises in repair. To this general rule the authorities recognized these exceptions: First. Where the landlord has, by an express agreement between the tenant and himself, agreed to keep the premises in repair, so that, in case of a recovery against the tenant, he would have his remedy over against the landlord. There, to avoid circuity of action, the party injured by the defect and want of

repair may have his action in the first instance against the landlord. Second. Where the premises are let with a nuisance upon them, by means of which the injury complained of is received."

That the owner in this instance was liable, regardless of the statute, under the second exception. See 1 Thomp. on Neg. 317, and cases cited; *Gridley v. Bloomington*, 68 Ill. 47; *Chicago v. O'Brennan*, 65 Ill. 160.

The argument of counsel for the defendant, Leshner, is devoted entirely to the contributory negligence of plaintiff. The brief presented is able and exhaustive of the question discussed.

Further discussion in addition to what has been said above is unnecessary. Numerous errors are assigned on the part of Leshner, but do not appear to be relied upon by counsel, except those pertaining to the question of plaintiff's negligence. We have, however, examined them.

Our conclusion is that no sufficient error occurred to warrant a reversal, and that the judgment should stand as entered.

Affirmed.

THE A. WESTMAN MERCANTILE COMPANY, APPELLANT,
v. PARK, APPELLEE.

1. CONSIGNMENT—BILL OF LADING.

Ordinarily, the consignor's ownership in goods ceases upon the shipment and transmission of a bill of lading, unless under special circumstances the right of stoppage in transitu is resorted to, and if the property is lost, the burden falls upon the consignee.

2. PRACTICE—INSTRUCTIONS.

It is not error to refuse to submit to the jury a question upon which there is no evidence.

Appeal from the District Court of Weld County.
VOL. II—35

THE appellant was an incorporated company doing business in the city of Denver, and as incident to its business was dealing in hay. In May, 1890, appellee entered into a contract with appellant by which he was to sell and ship to appellant an indefinite amount of hay during the season, being all appellee saw fit to ship at \$12 per ton for a certain kind of hay known as 2d bottom hay. Park resided at Evans, Weld county. After entering into the contract and from its date up to June 12th, various lots of hay were shipped, received and satisfactorily accounted for. On June 11th appellee shipped two cars of hay, some 36,000 lbs., to appellant, taking a bill or bills of lading. The cars arrived in Denver on the morning of June 12th; were switched on to a track in the yard of the Union Pacific Railway Co., somewhere in the vicinity of appellant's warehouse about the middle of the day, Sunday, June 15th. In the afternoon or evening of the same day a fire occurred in which appellant's warehouse was burned and some twelve cars of freight on the tracks in the vicinity, among which were five cars of hay consigned to appellant, including the two cars of appellee in controversy. After the burning there was an interview between the parties, in which it was agreed by appellee that appellant should present the claim of loss to the railway company as of its own property. This was by consent of appellee. The presentation was made and was evidently unsuccessful; proceedings of some kind appear to have been had against the railway company, but what they were, or the result, does not appear, only inferentially. After those proceedings, appellant refusing to pay for the hay, this suit was brought, tried to a jury, resulting in a verdict and judgment for appellee for \$220. Appellant contends that there was no delivery of the hay to it; that the tracks upon which the cars were burned, though in the immediate vicinity of the warehouse and in the yard, were not the tracks upon which they received cars; that it had had no notice of the shipment or arrival of the cars from either Park or the railway company; that there had been by them no examination of the hay, and

that, in their method of doing business, there was no change of ownership until examination and special acceptance.

Mr. H. N. HAYNES, for appellant.

Mr. H. E. CHURCHILL, for appellee.

REED, J., after stating the facts, delivered the opinion of the court.

In regard to the shipment by Park, the character and the value of the hay, the time of its arrival in Denver and the switching and delivery of the cars on a track in the immediate vicinity of the warehouse, and an intended delivery by the railway to appellant, there is no controversy. The contract, as testified to by Mr. Ballard, manager of appellant, appears to have been by letter addressed to Park in the early days of June, accepted by him and acted upon by the parties. "I wrote plaintiff we could pay him \$12 per ton on track in Denver or *on our track in Denver* for A No. 1, Second bottom hay." He does not say whether the words used were "on track in Denver" or "on our track in Denver." That he used the former is fairly to be presumed, because, first, it is commercial language; second, the putting it upon the special track was something that appellee could not control nor contract in regard to, and this view is fully sustained by his subsequent testimony, where he says: "*The term, on track in Denver means, under an arrangement of the railroad, on the track of consignee.*" It being under a contract with the railroad for switching and delivery, and not by virtue of the contract with Park, it was not contemplated or embraced in the contract. All that could have been understood was the ordinary significance of the words, the hay was to be hauled to Denver and delivered on a track at the expense of the shipper—that the place of delivery was to be Denver and not Evans. The delivery of the hay was complete as far as any duty to be performed by appellee, when the cars were left in

the general receiving yard of the railroad. It is ably urged, and many authorities are cited, that the railroad company was the agent of appellee for the delivery of the hay, consequently, he was responsible for any delinquency. The doctrine is too broadly stated, and involves two distinct propositions that should be separated, viz., the agency of the railroad company, and when the title to the hay passed. The general rule is that the common carrier is the agent of either or both, and might be made responsible to either, depending upon the circumstances of the case.

The question of ownership of the goods is another and distinct question. Ordinarily, the ownership of the goods in the shipper ceases upon the shipment and transmission of the bill of lading, unless under special circumstances the right of stoppage *in transitu* is resorted to. The consignment so completely passes the title to the consignee that he can sell to arrive, pledge or hypothecate by a transfer of the bill of lading; he can maintain replevin or trespass in regard to the goods. It will at once be seen that the question of agency for transportation is one entirely separate and distinct from that of the ownership; but admitting the premises and contention, and that the railway company was solely the agent of appellee, the agency ceased with delivery of the cars "upon the track in Denver."

The principal error relied upon was the refusal of the court to give the first, second, third, fourth and fifth instructions asked upon the part of defendant. The instruction given by the court was short, pointed and unmistakable, embracing all the law involved in the case, and fairly submitting to the jury the only questions of fact for their determination. The entire charge is the following:—

"Gentlemen of the Jury:—This is an action brought by George R. Park against The A. Westman Mercantile Company to recover the value of certain hay sold by the plaintiff to The A. Westman Mercantile Company.

"If you believe from the evidence that there was a contract between these parties for the sale of this hay, and that

the hay was delivered to The A. Westman Mercantile Company and was accepted by it, either actually or by virtue of any custom, if any has been shown regarding the dealings between The A. Westman Mercantile Company and The Union Pacific Railway Company; it will be your duty to find for the plaintiff.

“If you find under all the evidence that the hay in question was not delivered to the defendant, it will be your duty to find for the defendant.

“The burden of proof is upon the plaintiff to establish his case by a preponderance of the testimony; that does not always mean the number of witnesses, but, after hearing all the testimony, must convince your minds that the greater weight is in favor of the proposition that plaintiff maintains.

“If you find from the evidence before you that there was a contract that, before the defendant accepted any hay from the plaintiff, it had a right to inspect the same and ascertain its quality, and you further find from the evidence that the defendant had no opportunity to make such inspection in this case under the manner in which hay was delivered, if you find it was delivered at all, your verdict should be for the defendant.

“The testimony is for your consideration, and it is your duty to take into consideration all the facts and circumstances surrounding the case in determining the matter.”

The first, second and fourth instructions asked and refused were in regard to the delivery and acceptance of the hay, and were embraced in the instructions given by the court. The third was properly refused. It sought to make defendant's liability depend upon proof of notice from the railway company to the defendant of the arrival of the cars, a matter with which appellant had nothing to do, and of no legal significance, if the fact of actual delivery and acceptance was established according to the general manner and custom in which the business between the parties was transacted.

The evidence in regard to the delivery and acceptance of the hay was somewhat contradictory. They were questions

of fact peculiarly within the province of the jury to determine; were fairly submitted by the instruction of the court and found in favor of appellee. Such finding is conclusive upon this court.

The fifth instruction asked and refused was in regard to a supposed rescission or modification of the contract by a conversation between the parties on the 9th of June, two days before the hay in question was shipped. Mr. Ballard testified that after explaining to appellee that the market was full of hay, and stability of prices doubtful, said, "any further shipments of hay to us must be as to your own judgment." It is not shown that appellee made any response whatever. If any effect can be given to the conversation, it was not that appellee was to stop shipping or appellant receiving, but that a contingency might arise, and the condition of the market be such that there might in the future be a necessity of modifying the contract as to price. It is not shown that any such necessity arose. The most that could have been claimed for it would have been to allow appellee to use it upon the trial in reduction of damages. It was not a rescission, hence, the instruction asked, requiring the court to submit to the jury the question of rescission, was properly refused. There was no legal evidence to support the proposition.

It appears, *inter alia*, that appellant had about half a dozen cars of freight destroyed by the fire, including the two in controversy, and that it put in the two of appellee, after seeing him and getting consent, with the others in a claim against the railroad company; and that, while the claim was pending and undetermined, appellee went to the agent of the railroad company and asked him in regard to *his claim*, presented by appellant. It is urged in argument that this was incompatible with his subsequent claim asserted against appellant. The consent of Park that appellant should present it as its own claim is not incompatible with his contention in this case. If he had asserted his ownership to the official, and forbidden payment to the other party, it might have had

some legal bearing, but the evidence does not go to that extent. The hay was not paid for; he wanted his money; payment was delayed; he went to ascertain what the probabilities were, and probably spoke of it as *his* claim. It was not an estoppel; no one acted upon it; it was not pleaded nor relied upon as an estoppel; it was not raised in court nor acted upon in any manner so that an exception was saved or an error assigned. The most that can be claimed for it was that it was a declaration at variance with the claim being adjudicated, and could only affect his credibility. It was certainly no more incompatible than the course of appellant, insisting it was not the owner after having filed a claim as the owner. The jury probably, very properly, set off one against the other.

It appears incidentally in the record that some proceeding was had by appellant against the railroad company in which testimony was taken. We are not informed what the proceeding was, nor what the result, but it is evident that appellant failed to hold the railway company liable. It is fairly inferable that the company escaped liability by showing a delivery of the freight to appellant, but as before said, this is only an inference from what briefly appears in the record, and may be incorrect.

The judgment must be affirmed.

Affirmed.

LANDT, APPELLANT, v. MAJOR, APPELLEE.

1. BURDEN OF PROOF.

When the allegations of the complaint in an action for damages for a breach of covenant of seizin are denied, the burden of proof is upon the plaintiff.

2. SAME.

The burden of proof is generally upon the party holding the affirmative of the issue.

Appeal from the District Court of Arapahoe County.

Mr. LUCIUS P. MARSH, for appellant.

Mr. W. T. ROGERS, for appellee.

RICHMOND, P. J., delivered the opinion of the court.

In this case James S. Major, plaintiff, sues on a covenant of seizin contained in a conveyance of land made to him by the defendant. The breach assigned is that Landt was not well seized of a portion of the premises mentioned in the deed; that one Howard M. O'Haver held and owned a certain portion of the premises under an irresistible paramount title. Twelve hundred dollars damages claimed.

The defendant puts in a general denial of each and all of the allegations of the complaint, and as a second defense alleges that the plaintiff had conveyed the lands described in the complaint to one Ellen C. Hopkins. The court determined that the burden of proof was upon the defendant. Thereupon plaintiff offered no proof, and the defendant declined to introduce any testimony and excepted to the ruling of the court. Thereafter plaintiff offered proof to show the value of the premises alleged to have been conveyed and claimed by O'Haver. Judgment was rendered for the sum of \$625.

The sole question presented for our consideration is as to whether the ruling of the court was correct. Prior to the code the undoubted rule was, that the obligation was on the defendant in an action of this kind to establish the performance of his covenant of seizin, and the reason therefor is patent to any attorney familiar with common law pleading. But the necessity for a continuance of the rule does not now exist. Under the code practice the plaintiff is bound to set forth facts sufficient to constitute a cause of action. This he undoubtedly did, and the allegations are met by the general denial, and this puts in issue every allegation of the complaint, including the execution and delivery of the deed; and we think that it was the undoubted duty of the plaintiff to

prove the allegations, before a judgment could be rendered against the defendant.

Under the Michigan practice the defendant was permitted to plead the general issue, and in an action upon a covenant of seizin the precise question here presented was discussed, and all of the judges concurred in the conclusion that the burden was upon the plaintiff. Cooley, J., in rendering the opinion, reviews the English and American cases and, in conclusion, says: Where parties contract concerning lands on the assumption that one of them is the owner, it is a reasonable presumption that they have first satisfied themselves by inquiry what the title is; and if a defect comes to their knowledge afterwards, the party complaining of it should point it out. The law cannot assume that defects exist when the parties concerned, who may fairly be supposed to have inquired into the facts, assume the contrary: *Ingalls v. Eaton*, 25 Mich. 32.

This doctrine is approved in the case of *Peck v. Houghtaling*, 35 Mich. 127. And in this last case the conclusion reached is that the party alleging breach of covenant of title must prove, not only the making of the covenants, but also the breach thereof, and has the burden of proving both branches.

In *Woolley v. Newcombe*, 87 N. Y. 605, Rapallo, J., in commenting upon this question, after reviewing the authorities cited by the plaintiff in this case, says: "It is manifest that under our present system of conveyancing, the making the title to real estate matter of public record as accessible to the vendee as to the vendor, the reason for the former rule entirely fails, and in this state it no longer has any foundation whatever to rest upon; and if the common law system of pleading still prevailed the plaintiff, in replying to a plea of seizin, would doubtless be required to state, as in other actions of covenant, the particulars of the breach, and thus assume the affirmative. * * * Under the code, however, no replication is necessary; issue is joined by the service of the answer. The defendant is not bound to set up in his answer

performance of the covenant, but may put in a general denial, and this puts in issue the allegation of the breach of the covenant and throws upon the plaintiff the burden of proving it."

As a general rule the party holding the affirmative of the issue takes the onus of proving. There are, of course, exceptions to this rule, yet the general proposition is that, in all instances where the right of action depends upon a naked affirmative, the party making it is charged with the burden of proving it. This is in keeping with the rule that the burden of proving is upon him who raises an issue which would be defeated if no proof was offered. The proof necessary in a case of this nature must establish the execution and delivery of the deed of conveyance, breach of the covenant and the damages resulting. And evidently the plaintiff in this cause, after obtaining the favorable ruling of the court to the effect that the defendant had the burden of proof, found it necessary to introduce testimony tending to establish the damages for which he sought to recover, and without such proof the court could not have rendered a judgment. If such proof was necessary, we think it follows that the plaintiff was bound to introduce proof upon the other issues raised by the pleadings.

The judgment must be reversed.

Reversed.

LIGHTHALL, APPELLANT, v. MOORE, APPELLEE.

1. UNDUE INFLUENCE—EQUITY.

Where a transaction is the result of moral, social or domestic force exerted upon a party, controlling free action of his will and preventing any true consent, equity may relieve against it on the ground of undue influence.

2. SAME.

It is a constant rule in equity that where a party is not a free agent and is not equal to protecting himself, the court will protect him.

3. SAME.

A party in another's power may have canceled an inequitable bargain to which he was entrapped or practically compelled, though there may have been neither technical fraud nor technical duress.

Appeal from the District Court of Arapahoe County.

MARVIN H. MOORE brought this action for the purpose of canceling a promissory note for the sum of \$1,000, and a deed of trust executed to secure its payment.

Plaintiff alleges that in December, 1890, he executed his promissory note payable to the order of Albert C. Lighthall, two years after date with interest at eight per cent; and that for the purpose of securing the payment of the note, he executed and delivered a trust deed upon certain real estate; that the note and deed of trust were executed and delivered without consideration and were obtained and extorted from him by duress and threats of arrest and imprisonment, and were so executed by him through fear of such threats being put into execution.

The defendant specifically denies the allegations of the complaint, and further alleges that the same were made, executed and delivered for moneys had and received by the plaintiff; that the plaintiff was previously in the employ of the defendant, and during the course of his employment appropriated and converted to his own use certain sums of money, and that this note was given in satisfaction of the sum of money acknowledged to be due the defendant by the plaintiff and so misappropriated by him.

The cause was tried to the court and resulted in a finding favorable to the plaintiff. Decree of cancellation was entered.

Mr. F. A. WILLIAMS, for appellant.

Messrs. TROWBRIDGE & HINCKLEY, for appellee.

RICHMOND, P. J., after stating the facts, delivered the opinion of the court.

The evidence in this case discloses the fact to be that the

plaintiff, Moore, was in the employ of the defendant, Lighthall; that during a portion of the time he was engaged in soliciting trade and was instructed by Lighthall to occasionally indulge in the luxury of treating customers. While so employed, Lighthall claims to have discovered that certain moneys and goods were disappearing, of which no account was made; that by taking an inventory and comparing it with the inventory of the previous year, together with the sales and purchases, he believed himself to be the loser to the extent of about \$1,300, and ultimately fixed upon Moore as the guilty party, and agreed to settle with him on the basis of a note for \$1,000, secured by a deed of trust, and to effectuate this caused the plaintiff to meet him at the office of his attorneys, where he was charged with an offense against the law, and given to understand, if not directly threatened, that unless the matter was settled satisfactorily to defendant he would be considered a culprit and dealt with accordingly; that being a married man and realizing the position he occupied, he did, notwithstanding his protestations of innocence, execute the two papers which he now seeks to cancel.

The contention of counsel for defendant, that the note and deed of trust was the result of a compromise, or based upon an account stated between the parties, is inconsistent with the allegations in the answer, as well as with the testimony of Lighthall. By the answer it is alleged that the "plaintiff was indebted to the defendant in the sum of \$900, for moneys received by plaintiff in the course of his employment by defendant, and for moneys converted to his own use while in said employment," and the testimony shows that Lighthall contemplated, unless some settlement was made, instituting criminal proceedings. It may be remarked also that the testimony absolutely fails to show any defalcation on the part of Moore.

Lighthall himself testifies that he was not expert enough to discover any shortage.

"Q. You are not able to discover any shortage at this time?

“A. I am not expert enough.

“Q. You have not discovered anything but the \$15.00 and the \$3.85?

“A. And the Wilson business.

“Q. That was settled. But since that time you have not discovered any shortage except the \$15.00 and the \$3.85 which he took. Is that all?

“A. I guess that is all.

“Q. Do you know how much was due Mr. Moore on his salary outside of what you think he had taken when he left?

“A. No, sir.

“Q. Did you ever take pains to find out?

“A. No, I do not think I ever did: I do not know how we did stand at the time he quit.”

The well recognized rule is, that: “Where there is no coercion amounting to duress, but a transaction is the result of a moral, social or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly susceptible and yielding—his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like.”

Pomeroy's Equity Jurisprudence, vol. 1, § 951, lays down this doctrine: “Cases of an analogous nature may easily be put, where the party is subjected to undue influence, although in other respects of competent understanding. As, where he does act, or makes a contract, when he is under duress, or the influence of extreme terror, or of threats, or of apprehensions short of duress. For, in cases of this sort, he has no free will, but stands *in vinculis*. And the constant rule in equity is, that, where a party is not a free agent,

and is not equal to protecting himself, the court will protect him."

In Bishop on Contracts, § 741, it is held that, "One in another's power, may, on application to the equity tribunal, have canceled an inequitable bargain to which he was entrapped or practically compelled, though there has been neither technical fraud nor technical duress. In short any complications in which a party may find himself involved, whereby his act of contracting is not that of a free agent, may, at least in equity, be availed of by him to avoid it, as against those by whose procurement it was made." See § 742.

The identical question here involved has received the consideration the appellate court of Illinois in the case of *Kieth v. Buck*, 16 Ill. Ct. App. 121. In that case the court took occasion to comment favorably upon the language of Justice Scott in the case of *James v. Roberts*, 18 Ohio St. 548, wherein this language was used: "Some allowance must always be made for the imperfections of the human judgment under certain circumstances; the conduct of persons accused of crime, although they may be entirely innocent, is often most inexplicable. Such persons often magnify manifold the dangers that surround them. Under such circumstances their fears are easily wrought upon, and the law will not always require of them the exercise of that clear and accurate judgment that would otherwise be expected. Under the facts in the case we cannot regard the parties as standing *in pari delicto*."

In both of the cases above referred to the relief prayed for was granted. And so also was a similar result obtained in the case of *Catlin v. Henton et al.*, 9 Wis. 496.

We think that the above recited principles are indisputably applicable to the case in hand. An employee is charged with a criminal offense—a crime well known to the statutes of this state. He is conducted to the presence of his employer's counsel, and there for the first time is confronted with the statement that his employer claims to have lost a

large sum of money and believes him to be the culprit. He is advised to deliberate upon the situation. A compromise is suggested and he is given to understand that unless he shall execute a note and secure the payment of the same upon real estate then standing in his name, charges will be preferred and that the jail will be his doom. Still protesting his innocence, and so continuing to protest for a period of four days, he ultimately executes the papers and then receives from his employer a letter of recommendation wherein he is extolled as a man of honesty, so strong in terms as even to cause him to utter exclamations of surprise. We do not think that there is any compounding of felony in this transaction, because the record does not disclose that any crime had been committed, but we do think there is sufficient evidence to establish the fact to be that the plaintiff executed the papers in question in the face of threats made by Lighthall, and that the proof fails to show any consideration moving from Lighthall to Moore. And inasmuch as the only ground upon which the defendant can insist that the judgment should be reversed is that the findings are contrary to the evidence, we think that the rule heretofore frequently announced by the supreme court of this state and by this court, to the effect that the verdict of the jury or the findings of the court will not be disturbed where there is sufficient evidence to support the same, warrants us in affirming the judgment.

The judgment must be affirmed.

Affirmed.

TAYLOR, PLAINTIFF IN ERROR, v. WILLIAMS, DEFENDANT
IN ERROR.

VENDOR AND PURCHASER—ABSTRACT—ACTION FOR MONEY PAID.

Where plaintiff agreed to purchase real estate of defendant, paid part of the purchase money and took a receipt therefor, showing that

the agreement was that the balance was to be paid on or before a day named, "on delivery of a warranty deed conveying clear title, with abstract," *Held*:

1. That the plaintiff could insist upon the delivery of an abstract showing clear title as a condition precedent.
2. That upon default in furnishing such an abstract, the plaintiff had his action for the money paid.
3. That the defendant could not, in such an action, shown as a defense that the defects in the title disclosed by the abstract did not exist, or that his title to the premises was complete and perfect.

Error to the District Court of Las Animas County.

Mr. JAMES M. JOHN and Mr. M. E. STEVENS, for plaintiff in error.

Mr. CALDWELL YEAMAN, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

In the month of March, 1889, C. M. Williams, defendant in error, entered into a contract of purchase of certain real estate in the city of Trinidad with the plaintiff in error, D. L. Taylor. The consideration price for the property was \$7,500; \$500 was paid at the time of entering into the contract; the balance of \$7,000 was to be paid upon the execution and delivery of the abstract of title, together with a warranty deed.

At the time of the payment of the money the following writing was executed by Taylor:

"TRINIDAD, Colo., March 9, 1889.

Reced of C. M. Williams five hundred payment on acc. of the sale "City Hotel" property, balc. of \$7,000 to be paid on or before Apl. 1st, on del. of warranty deed conveying clear title with abstract.

D. L. TAYLOR."

It appears from the record that an abstract of title was furnished and submitted to the solicitors of Williams; that the ultimate conclusion of the solicitors was that the abstract

did not show a perfect title in Taylor and an opinion was rendered to that effect.

On May 3, 1889, Williams, by letter, dated at Colorado Springs, advised Taylor of the conclusion reached by his solicitors and forwarded to him a copy of the opinion, which opinion pointed out the defects in the title.

Subsequently a demand was made for the return of the \$500, and expense of examination of title, together with interest on the \$7,000, which had been lying idle in the bank for a period of several months, for the purpose of meeting the final payment. This demand was refused and action brought.

In the course of the trial certain documentary evidence was offered for the purpose of establishing Taylor's title, to which objection was made and sustained. The cause was tried to the court. The court found for the plaintiff and rendered judgment for the sum of \$750.60. To reverse which this writ of error is prosecuted.

The first thing we have to determine is the character of the contract. If from the language of the entire contract we shall conclude that the intention of the parties was such that the agreement on the part of Williams was to consummate the purchase by paying the balance of the purchase price when he should receive an abstract showing a clear and undoubted title in Taylor, and that it was the duty of Taylor to furnish such abstract, which he failed to do, then the conclusion will be that the furnishing of such abstract was a condition precedent, and it is the duty of both courts of law and of equity to enforce the same.

It is a well known fact that few persons purchase real estate at the present time without first obtaining from the vendor an abstract of the records showing the condition of the vendor's title, and with the view of having such title passed upon by some one learned in the law. We have no doubt but that the parties to this transaction, at the time of execution of the writing and the payment of the \$500, well understood that the abstract should precede the execution and

delivery of the warranty deed, and that it should receive the consideration of such solicitors as the vendee might select. This is confirmed by the action of Taylor in procuring an abstract, and in retaining within his possession the warranty deed, and his frequent consultation with parties having the abstract under consideration.

It is nowhere claimed in the record that the abstract so furnished did show a perfect title. On the contrary, it is insisted that notwithstanding the admission that the title was faulty, as shown by the abstract, yet nevertheless in an action to recover back the money paid as part of the purchase price, the defendant was entitled at the trial to show that he had a complete and perfect title to the premises. We cannot agree with this contention. The contract was to furnish an abstract of title, and such abstract should contain whatever concerns the sources of the title and its conditions. Not only should the descent and line of the title be clearly traced out, and all incumbrances, all chances of eviction, or adverse claims should be shown, but material parts of all patents, deeds, wills, judicial proceedings and other records or documents which touch the title, and also liens and incumbrances of every nature, should be set forth. And in every contract for the sale of real estate it is implied that the seller will, before the completion of the contract, show a good marketable title. The object of the abstract is to enable the purchaser or his counsel to pass more readily on the sufficiency of the title. This being so, we are unable to see how the defendant, Taylor, could have insisted on the completion of the contract of purchase by Williams until, as by the terms of the contract, he had shown by abstract a perfect chain of title. If he could not do this, then clearly he had no right to retain in his possession the money which he had received under the contract as part of the purchase price. But, in addition to the foregoing, it is insisted that because Williams retained the contract within his possession for a period of a month over the time specified in the agreement for the delivery of the abstract and deed, that he thereby ex-

cused the performance and thus entitled the defendant to introduce in proof his chain of title. While it is true that this delay in rescinding the bargain on the part of Williams was a voluntary act on his part, it in no way prejudiced Taylor, but, on the contrary, furnished him a further opportunity of providing an abstract. Besides, it appears that from the time of the return of the abstract and demand of repayment to the commencement of the action, three months elapsed, and that from the commencement of the suit until rendition of judgment more than six months. Yet at no time, not even on the trial of the cause, did Taylor present an abstract other than the one which had been rejected and which was admitted to be defective. Had the defendant tendered an abstract showing a good title prior to any rescission of the bargain by the vendee, he could have enforced the contract of sale. What his rights might have been had he made such tender prior to the bringing of this action or even at the trial it is wholly unnecessary for us to determine.

It is said by the English authorities, the lapse of time may be disregarded in equity, in decreeing a specific performance of a contract for land. There is, however, a vast difference between contracts for land in England and in this country. There the lands have a known, fixed and staple value, and this rule might be enforced with justice to all parties; but in this country, where the price is continually fluctuating and uncertain and a day often makes a great difference, and in almost every case, time is a very material circumstance. Such in substance is the language of Justice Livingston in the case of *Hepburn v. Auld*, 5 Cranch, 279.

It may be added to this that at the present day business is done with such comparative speed, changes of property and places of business are so frequent, that it would in most cases be inequitable to compel a party to accept property after any considerable delay, or to compel him to keep his funds unemployed through fear that the court may order him to accept it on terms of delay that he never assented to. *Richmond v. Gray*, 3 Allen, 25.

We have been unable to find any rule of equity or principle of law that would justify us in saying that a court should compel a party to accept a deed to premises after so long a delay as is here shown on the part of the defendant, or to declare that a party who had generously extended the time for the performance of conditions precedent to purchase, would not be entitled to recover the amount paid and his legitimate damages by reason of the failure of the seller to perform the conditions of his written promise.

Certain it is that a defective record title is not marketable, and that a specific performance will never be decreed on the suit of the vendor whenever the doubt concerning title is one which can only be settled by further litigation. *Turner v. McDonnell*, 76 Cal. 177; *Richmond v. Gray*, *supra*; *Gans v. Renshaw*, 2 Pa. St. 34; *Studevant v. Jacques*, 14 Allen, 523; *Howe v. Hutchinson*, 105 Ills. 501.

What absolves a vendee in equity will discharge him at law from responsibility upon a contract to buy. *Schroeder v. Wittram*, 66 Cal. 636.

The case of *Smith v. Taylor*, 82 Cal. 538, is one very similar to the one in hand. The court in commenting upon the contract said: The only fair interpretation of this contract is that he was to furnish an abstract of title,—a paper prepared by a skilled searcher of records which should show an abstract of whatever appeared on the public records of the county affecting the title,—and that this abstract must show good title, or there was no sale, and in that event he must return the money. It appeared that the abstract did not show good record title, and the court held that the plaintiff was not bound to make any investigation outside the abstract, or to take the chances of any litigation which the abstract showed to be either pending or probable. In that case as in this it was insisted that the vendor had the right to prove by evidence *aliunde* that the claims of persons who appeared by the abstract of title to be asserting title to land adverse to the title which he offered, and who had suits pend-

ing regarding the same were groundless. Such evidence was held inadmissible.

We do not think that the title was involved in this action. By the abstract it was shown that the condition of the title was such as to put Williams in a position to treat the contract between himself and the defendant as rescinded. *Schroeder v. Wittram, supra.*

In what respect the damages are excessive is not pointed out. Plaintiff had an undoubted right to recover the sum of \$500—the amount paid out for examination of the abstract and the interest on the sum which had remained idle during the pendency of the contract between the parties.

We do not feel called upon to exercise our arithmetical talent in ascertaining by computation precisely the amount of the excess. Besides, this is a matter that should have been brought to the attention of the court below, where it undoubtedly would have been corrected.

Counsel for plaintiff in error discusses the inadmissibility in evidence of opinion as to the defect of title. The opinion was put in evidence by consent as shown by the bill of exceptions, therefore they are not in a position to insist upon this as error.

We are clearly of the opinion that the findings of the court below were correct, and that the judgment was properly entered for the plaintiff.

The judgment must be affirmed.

Affirmed.

RICE, PLAINTIFF IN ERROR, v. HAUPTMAN, DEFENDANT
IN ERROR.

1. PRACTICE IN ATTACHMENT.

Questions as to the sufficiency of an affidavit in attachment, not raised in the court below, will not be considered on review.

2. SAME.

Defects in an affidavit in attachment must be taken advantage of in the court below before trial upon the traverse.

3. WAIVER BY STIPULATION.

Parties stipulating that the trial upon the traverse in attachment may be had at a day later than the trial upon the merits, will not be heard to complain of irregularity in the order of proceeding in this respect.

Error to the County Court of Arapahoe County.

Mr. CHARLES H. BURTON, for plaintiff in error.

Mr. ISAAC E. BARNUM, for defendant in error.

RICHMOND, P. J., delivered the opinion of the court.

This was an action brought by William C. Hauptman, defendant in error, against Margaretta G. Rice, plaintiff in error, to recover the sum of \$61.00 for services rendered. Suit was instituted before a justice of the peace, and an attachment writ sued out. Affidavit in attachment was traversed and counterclaim filed. The cause was tried, and resulted in a judgment against the defendant for the sum of \$49.00. An appeal was prosecuted to the county court. The cause was again tried and resulted in a judgment against defendant for the sum of \$44.00, besides a judgment sustaining the attachment.

To reverse this judgment three errors are assigned :

First. In rendering judgment for the plaintiff.

Second. In sustaining the attachment proceedings.

Third. In trying the issues in attachment after rendering judgment upon the main issue for the plaintiff.

We have carefully reviewed all of the testimony in this case and have reached the conclusion that there is ample testimony to support the court in finding for the plaintiff and rendering judgment thereon.

In regard to the contention that the affidavit in attachment was defective, we have to say that the plaintiff is not in a position to, for the first time, raise the question in this court. It is a question that should have been raised by motion to

quash, and after having traversed the affidavit in attachment, the defendant could not interpose such a motion. Defects of this nature and irregularities in attachment proceedings must be met in the proper way in the court below, and before going to trial upon the issues raised by an affidavit traversing the affidavit upon which the attachment writ is issued.

With reference to the third point, that the court should have first determined the issue raised in the attachment proceedings before trying the main issue, we call attention to the fact that the record shows that the trial of this issue was by consent of both parties postponed until September 9th. The language of the stipulation, after entitling the cause, is as follows: "In this cause it is stipulated that the hearing on the traverse may be continued until September 9, 1891." Signed by attorneys for plaintiff and defendant. It was heard on September 9th, and determined on September 14th, and no exception reserved to the judgment thereon.

In the face of this record we are unable to conceive how any one could expect it to be within the realms of possibility that the judgment herein entered could be reversed.

Having reached the conclusion that there is ample testimony to support the findings of the court upon the main issue, we are compelled to affirm the judgment.

Affirmed.

HIGGINS, ET AL., APPELLANTS, v. THE PEOPLE OF THE
STATE OF COLORADO, APPELLEES.

1. AMENDMENT AFTER APPEAL.

A court has power to vacate a judgment at the term at which it was rendered, and permit the pleadings in the case to be amended, notwithstanding an appeal from the judgment has been perfected.

2. SAME—DISCRETION.

The allowance of amendments to pleadings rests in the sound discretion of the court.

Appeal from the District Court of Las Animas County.

Messrs. NORTHCUTT & FRANKS, for appellants.

Mr. JAMES M. JOHN, for appellees.

RICHMOND, P. J., delivered the opinion of the court.

At a term of the district court of the third judicial district within and for the county of Las Animas, one Thomas Higgins was indicted for assault with intent to kill and murder. Trial was had and resulted in a verdict of guilty, which verdict was set aside and new trial ordered. Thereafter Higgins as principal and John O. Packer and Jesse G. Northcutt as sureties, entered into a recognizance in the sum of \$2,000, conditioned that the said Thomas Higgins should personally be and appear before the district court on the next regular term thereof to be holden in the court house in Trinidad in said county on the 9th of March, 1891, and from day to day of each term thereof.

On the 17th of March, A. D. 1891, the same being one of the regular judicial days of the March term of said court, the said Higgins then and there failed to personally be and appear. The complaint recites that he was called but came not, and therein made default. That thereupon the said Packer and Northcutt were also called to bring into court the body of Thomas Higgins, which they failed, refused and neglected to do, and thereby made default in the conditions of the said recognizance, and the same was then and there by order entered of record in said court, declared forfeited.

To the original complaint a demurrer was interposed, on the ground that it did not state facts sufficient to constitute a cause of action. It was overruled and defendants elected to stand by the demurrer. Judgment was thereupon entered. An appeal prayed, appeal bond filed and transcript ordered.

Thereafter at the same term of the court, the district attorney appeared and moved the court to vacate the judgment, admitting that the complaint was defective. To thus vacating the judgment defendants interposed objections, but never-

theless the motion was allowed and the court then permitted the complaint to be amended by inserting the words, "which said recognizance was then and there duly filed in the district court of said county and become a part of the records thereof."

The demurrer to the original complaint was permitted to stand as the demurrer to the complaint as amended, and was overruled. Defendants refused to answer and elected to stand by the demurrer, default and final judgment.

The errors assigned are that the court erred in permitting the plaintiff to amend the complaint, and that even with the amendment the complaint is insufficient in this, that it fails to show that the default of the principal, Higgins, was entered of record.

The first question is most unmistakably met and answered by the conclusion of the supreme court in the case of *Horn v. Reitler*, 15 Colo. 817. This was a case which was upon appeal reversed and thereafter a new trial was had, but previous to proceeding to trial application was made to amend the pleading, and granted. The court, in the course of the opinion, says: "The amended pleading appears to have been necessary to enable the plaintiff to fully and thoroughly present upon the trial his defense to the new matter set up in the answer, and was properly allowed. It is not claimed that defendant was surprised at the nature of the matters pleaded therein, and, if he had shown such surprise this would more properly have furnished a ground for a continuance than a valid objection to the allowance of the amendments. It is the policy of the code to allow amendments to pleadings whenever the ends of justice will be subserved thereby, and it has been repeatedly held by this court that such amendments may be permitted in the discretion of the court after one trial has been concluded and a new trial ordered. Such applications are addressed to the sound discretion of the trial court, and its decision thereon will not ordinarily be disturbed."

Such being the rule, we are of the opinion that the contention of appellants herein is without merit. The vacation

of the judgment was undoubtedly within the power of the court, and the leave to amend the complaint thereafter finds its warrant in the rule laid down. If after trial and an appeal and reversal of judgment an amendment is allowable under the code, how can it be argued that upon vacation of its own judgment, when such judgment is within the absolute control of the court, an amendment to pleadings should not be allowed. The amendment permitted was not a matter of surprise nor did it in any wise prejudice the defendants. On the contrary the record discloses the fact to be, that they well knew of the necessity of the amendment, and that they precipitated their appeal by filing a bond and calling for a transcript before the expiration of the time and during the term of court wherein default and final judgment was entered. It was purely a technical defense, and the situation fully supports the court in the exercise of its discretion in allowing the amendment at the time.

With reference to the point that the complaint fails to show that the default of the principal obligor was entered of record, we have to say that we think the complaint sufficiently alleges that fact. For after reciting that the principal, Higgins, was repeatedly called, and the subsequent calling of Packer and Northcutt as sureties, it then says, "and thereby made default in the premises and conditions of their said recognizance, and the same was then and there, by order entered of record in said court, declared forfeited." The most that can be said of the complaint in this particular, is that it is rather disconnected and ambiguous. The demurrer only alleges that the complaint fails to state facts sufficient to constitute a cause of action. All other grounds of demurrer save and except jurisdiction must be enumerated. Such is the provision of the code and the repeated decisions of the Supreme Court as well as this court. If counsel for appellants could have found any authorities in support of the last proposition, we assume that they would have cited them. The authorities cited seemingly support the proposition that the recognizance on which the action

was brought should be returned to the clerk of the court in which the principal therein was bound to appear. These authorities have no application to the situation of the parties nor any relevancy to the issue presented by the complaint. The record distinctly shows that the recognizance was taken in open court and was made a part of the record then and there, and it is so recited in the complaint by the very words of the amendment, if it did not sufficiently appear before.

The judgment is affirmed.

Affirmed.

HUMMEL, APPELLANT, v. FIRST NATIONAL BANK OF CENTRAL CITY, APPELLEE.

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2	571
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1. BANKS—TRUST FUNDS.

Moneys deposited or placed in bank for the payment of a draft become trust funds, applicable only to the payment of the bill, cannot be diverted from the purpose to which they were to be applied, and do not lose their character by being commingled with the general deposits.

2. SAME—ADMINISTRATOR'S INTEREST IN.

Trust funds in bank may not be diverted to other uses than those designated, do not become the property of the banker, and form no part of his estate. His administrator takes and holds them merely as a bailee.

3. AGENCY.

The relation of banker and correspondent for the purpose of collection is that of special agent to do a particular thing.

4. PRINCIPAL AND AGENT—NOTICE.

The principal is chargeable with the information acquired by his agent, whether he obtained it in the course of the transaction of his principal's business or otherwise, providing the knowledge is so acquired by him as to be presumptively within his recollection when he is acting on behalf of the principal.

5. NATIONAL BANK—PRACTICE.

A national bank organized to do business in this state is not a foreign corporation within the rule which requires proof of corporate existence under a general denial.

Appeal from the District Court of Arapahoe County.

Mr. A. H. DEFRA^NCE, for appellant.

No appearance for appellee.

BISSELL, J., delivered the opinion of the court.

The very learned and elaborate opinion delivered by Mr. Commissioner Patterson (14 Colo. 259) when this controversy was before the supreme court, determines this case unless the proofs which were taken on the trial in some way limit the application of the doctrine which the court laid down in that opinion. After a very exhaustive review of all of the authorities, the court held that the funds which were deposited by Heatley in Everett's Bank for the payment of the draft which had been drawn by Risdon, became trust funds, applicable only to the payment of the bill. The broad principle was asserted that under the circumstances of the payment the funds could not be diverted from the purposes to which they were to be applied, and that they did not lose their character by being commingled with the general deposits of the bank. The present opinion must be read in conjunction with the one delivered at that time, to properly apprehend the limitations under which it is rendered. The facts will not be restated, except in so far as they are varied by the evidence. Generally it may be said that the proof showed that under the arrangement which he made with Heatley, Risdon, on the 15th of July, drew a draft on him and indorsed it to the present plaintiff, the First National Bank of Central City, which paid him the money, less the regular discount. This bank transmitted the bill to Everett, a banker at Golden, with directions to collect it and remit the proceeds to the German National Bank of Denver. On receipt of the bill Everett's Bank presented it to Heatley, on whom it was drawn, who paid it in this wise: he was the holder of two certificates of deposit of \$1,000 each, and had to his general credit in the bank a little more than \$200; he surrendered the certificates of deposit, which were placed

to his credit; he then drew a check on the bank for the amount of the draft which was marked paid, and the amount was charged to his individual account on the ledger. The banker, under his instructions, turned over to Heatley a note and deed of trust on certain property which had been executed by Risdon to secure the payment of the loan. In the forenoon of the day on which this transaction occurred, and shortly thereafter, Everett died and left his institution in a hopelessly insolvent condition.

It was proven that one Charles T. Clark was the county treasurer of Jefferson county, and had deposited the county's money in Everett's Bank. On the 17th of July, when the draft was paid, there was standing to Clark's credit under the general heading in the bank's books of "Clark, Charles T., County Treasurer," \$6,898.84. It also appeared that McGee, the city treasurer of Golden, had a balance on the same date, as treasurer, of \$4,909.14. The daily balance book of Everett's Bank showed the amount of cash on hand, at the close of business, July 16th, to have been \$5,583.19, and on July 17th to have been \$6,763.29.

Aside from these proofs the case shows that the administrator attempted to defend by setting up that Everett died on the 17th of July, 1884, leaving a last will and testament which was admitted to probate on the 4th of August in the county court of Jefferson county. By the will, James M. Manahan, together with Gregory Board and Clara B. Everett, were named as representatives. On the 21st of July, according to the allegations, Manahan took possession of the bank, of which he had been cashier for five or six years prior to Everett's death. He remained in possession until the 22d day of August following, when Hummel, the present defendant, was appointed administrator with the will annexed, and proceeded to wind up the estate. The allegations of the defense are probably broad enough to necessitate the inference that Manahan qualified as executor, and as such legal representative went into possession of the estate. It will not be so assumed, however, for the purpose of this decision, since

it was conceded on the argument that Manahan never qualified as executor, nor gave the bond required of him, although he in a manner went into possession probably by virtue of his nomination. It will be assumed that he was not a qualified executor in legal contemplation. This latter defense was excluded on demurrer.

The facts put in evidence and those stated in the plea are without complexity. The substantial difficulties arise from the attempt to apply to them some very difficult legal propositions. It has been very elaborately argued that the bank was not entitled to recover against Hummel because there were no moneys in the institution at the time that Heatley attempted to pay the draft drawn on him by Risdon, other than the funds which belonged to the treasurer of Jefferson county and the treasurer of Golden City.

The doctrine which was laid down in the *First National Bank v. The Insurance Company*, 104 U. S. 54, and likewise stated in the opinion of 14th Colorado, before referred to, is by argument used to support the defendant's contention. These cases clearly hold that when a depositor puts the money of another into a bank, and his title is such as to impress it with a trust character, of which the bank has knowledge, the fiduciary may follow it and recover it from the bank, although it be money and wanting in respect of the earmarks formerly essential to this right. On principle, and according to those very eminent authorities, the rule cannot be so far extended as to enable the *cestui que trust* to pursue the funds beyond the custody of the bank, or into the hands of innocent parties. The Insurance case simply held that the company had a right to recover from the bank as against its officers, stockholders and directors. The bank had full knowledge of the character of the deposit. It was made by the agent in the interest of the Insurance Company, and had only disappeared because of the bank's attempt to divert it to the payment of a private debt which the agent owed that corporation. On the theory that trust funds might be pursued even though they lack the distinguishing earmarks, the

court adjudged the bank responsible. In the case in 14th Colorado it was decided that the money which was paid in by Heatley for the payment of the draft drawn on him through Everett's Bank was likewise a trust fund, which could not be diverted for the benefit of the general creditors of the institution. The sole question is whether the proof of the manner of payment prevents the application of the doctrine therein established. No such result seems necessary. It is quite possible that Heatley added nothing to the general funds of the bank in the shape of money when he surrendered his certificates. He parted with the credit, and he received as security that to which otherwise he would not have been entitled unless the payment was made.

I do not understand any of the cases to go so far as to hold that where the relations of banker and depositor are proven to exist, none of the consequences ordinarily resulting from that relation can be held to follow. Whenever a public official who has the absolute control of money, deposits it in a bank without condition, he so far parts with the title that he cannot pursue it in the hands of those to whom it is paid in the regular course of the bank's business, at least without proof that the payee had knowledge of the trust and that the money he received was a part of that fund. The same legal result ought to follow in a case like the present. Heatley drew a check to pay the draft which was charged to his individual account. The draft was marked paid, and surrendered, and at the same time, and as a part of the transaction, the banker, in pursuance of his instructions, delivered to him a note and trust deed evidencing the debt and securing its payment. The note and trust deed are outstanding, or they have been paid. In either event, to permit this defense to prevail must subject one or the other of these innocent parties to grave loss. It is not easy to see how Risdon can be compelled to pay again what he may have already liquidated, or how Heatley can be adjudged to look to his debtor for further security when the original has been destroyed by this judgment, since neither of them have had

their day in court and been heard in defense of their rights and equities. There is likewise lacking an element of proof which would in any case be essential to the application of the doctrine. While the evidence showed that there were less moneys in the bank than stood to the credit of Clark as treasurer, and McGee as treasurer, yet there was no evidence as to the date of those deposits, nor was it made to appear to a certainty that the moneys deposited by the respective treasurers had not long been paid out in the regular course of business by the bank, and the moneys on hand were the aggregations of deposits by other persons, between whom and the banker the relation of debtor and creditor existed. The importance and great bearing of these suggestions is manifest when the circumstances of the payment by Heatley are recalled. At that time he was a general depositor of the bank with money to his credit on the books. He held two of the bank's certificates of deposit for more than the amount called for by the draft, and these he indorsed and surrendered in payment of the bill. It does not transpire that the treasurers' deposits either antedated Heatley's, or that they had not been loaned out by the banker and were yet in the hands of the borrowers. Were this the condition of affairs, manifestly as to such loans the officials were remediless, and as to all such funds they sustained no other relation to the bank than that of simple contract creditors. According to the evidence, whatever deposit was made by the two treasurers was a general one, subject to check. It passed into the general funds of the bank, and was paid out to the customers in the usual course of business. Such circumstances must be held as to third persons obtaining the money without knowledge of its character to create no other or different rights than those which spring from the relations sustained by the bank to its customers. The case is then left subject to the ordinary presumptions which may be indulged in when the rights of persons who are without preferential claims are weighed and measured. Heatley had on deposit upwards of two thousand dollars when he attempted to pay the draft with his certifi-

cates. It is as fair to presume that his \$2,300 was a part of the \$6,763.29 in the bank when it ceased to do business, as to contend that it was all money which had been deposited by the county and city treasurers. If it was, then, under the ruling in the 14th Colo., it was a trust fund which could not be subject to the statutory scheme of distribution regulating the settlement of estates, nor to the claims of other creditors. The testimony is not sufficient to permit the application of any other principle to the case than what was laid down in that opinion. Whatever might be our own ideas, we are controlled by the principles therein enunciated. We are not hampered in our announcement by a conviction that they are wrong in theory, or that they are inaccurately applied. We think the law was correctly stated, and is quite as controlling on the case as made by the proofs as it was on that made by the pleadings. Another, and perhaps as strong a reason for refusing to adjust the principle to the present controversy, is found in the fact that the defence was set up by Hummel, who was simply a representative of the decedent, and not by the treasurer of the county in whose favor the trust ran. It is difficult to see what right Hummel has as a representative of the deceased banker to insist that what Heatley did amounted to no payment, because his intestate had theretofore converted moneys properly represented in those accounts. The right and duty of an administrator to protect the estate which is committed to his care is conceded. But it was solemnly adjudged that what Heatley paid in was a trust fund which might not, by the banker, be diverted to any other uses than those designated at the time of the payment. It then follows that they never became the property of the banker. Lacking this, they likewise formed no part of the estate, as such, which passed into the custody of the representative. His possession was not as the representative of the decedent holding and protecting an estate, but it was as a kind of bailee for the true owner. So far as he is concerned he is without title, and on judgment must turn over. What his responsibility might be in case he should fail to

pay, having commingled the money, need not be here passed on. It is enough to show that his contention constitutes no defense. If he occupies this relation to the fund and to the Central City Bank, how can it be any defence to say that when the money came into the hands of the banker it became liable to the assertion of a superior equity by a third person. Hummel is in no sense holding in the right of that other. He is without any title to the money as regards the Central City Bank. Neither does he have or represent the title of the county treasurer. It has never been transferred to him. The general creditors of the estate and the heirs have no claim to the money. How then does it concern Hummel that the county treasurer may possibly have some claim to the money? If it is because he may be twice holden for the money, his remedy was to bring the treasurer into the litigation and have the question settled. Without this he is simply a volunteer, having no such title or claim, derivative or otherwise, as will admit a defence of this sort. Even though the right existed in favor of the county or its treasurer to pursue these funds, this defense cannot be open to the representative without some proof that a claim has been made on him for the money which he has received, and that the funds which he holds are certainly those on which he seeks to impress the trust character, and then only by bringing in the one in whose favor the title is asserted. The relations between Everett the banker and the Central City Bank, were not such as to charge that bank with Everett's knowledge concerning the character of the deposits in his hands. Everett's position as the correspondent of the Central City Bank for the purposes of collection brought him into no such relations to that corporation as would make him either the general agent or an agent other than a special one to do a particular thing. It was formerly held that a principal was only chargeable with the knowledge which the agent acquired while engaged in the transaction of the principal's business. This doctrine has been much modified of late years, and it is now probably true that the principal is

chargeable with the information acquired by his agent, whether he obtained it in the course of the transaction of his principal's business or otherwise, providing the knowledge is so acquired by him as to be presumptively within his recollection when he is acting on behalf of the principal. Story on Agency, § 140; *Armstrong v. Abbott*, 11 Colo. 220; *The Distilled Spirits*, 11 Wall. 356; *First National Bank of Denver v. Campbell*, ante, p. 271.

It would be a novel application of the principle that notice to an agent is notice to the principal, to hold that a banker who receives a draft for collection and to remit, is so far the agent of his correspondent as to charge that correspondent with the knowledge which the banker has of the character of his deposits. To carry this doctrine to its legitimate conclusion would enable the county treasurer of the county of Jefferson to pursue all moneys which may have been paid out by Everett in the liquidation of the various collections which he made for other banks and bankers into whosoever of their hands the money may have gone. The impracticability of extending the doctrine to any such limit, and the immense disturbance which it would occasion to the monetary affairs of the country must prevent the application of the doctrine. In one sense Everett was the agent of the Central City Bank for the purposes of collection. The money paid to him would undoubtedly be a discharge of the obligation of the debtor. But he was not an agent in such a sense as to bind his correspondent with the knowledge which he may have had as to the character of the moneys on deposit in his bank, and out of which the foreign banker may have been paid. Whether any such exception has ever been ingrafted on the law of agency by an express adjudication is not apparent to the court, but it is evident that the rule must exist as between banks and bankers in a case like the present. A case was cited in support of counsel's contention in this respect. *Bank v. Gas Company*, 36 Minn. 75.

If this case holds any different doctrine from the present, this court would decline to follow it. It is impossible to de-

termine from a careful examination of that decision the ground upon which it rested, or the facts involved in the decision. It is true that the bank in that case had been defrauded of its money by the misrepresentation and deceit of Kerr, who placed the money with his brother for ultimate disposal. It is likewise true that the Gas Company in some manner not disclosed by the case induced the brother to part with the money, and that the bank was permitted to recover from the Gas Company that particular fund. On what principle the Gas Company was charged with knowledge of the character of the fund, and therefore held, is not clear. It is very evident that that court did not intend to go so far as to hold that funds charged with a trust, because of the circumstances under which they were received, could be followed into everybody's hands, unless there were some special circumstances binding the conscience of the defendant, or out of which a liability in regard to the fund might have arisen in favor of the original *cestui que trust*. It is conceded, and would be, regardless of that authority, that the fund may be followed into the hands of a third person whenever requisite knowledge can be brought home to the party, or any other circumstances are apparent which would charge him with the responsibility. It must be conceded, however, that something besides the fact that the trust character was impressed upon the funds must be proven to sustain a recovery in such a case.

Another defense on which considerable reliance is placed springs from the fact that the First National Bank of Central City brought suit against Manahan to recover \$1,200, which they claimed Everett held for them when he died. The complaint in that case was in all essential particulars like the one in the present suit, with the exception, of course, of the omission of the allegation which charged the appointment as executor to have been made by the court, and a qualification as such under the statute. This, it is assumed, must be true, since any other conclusion would not be supported by the fact. To that complaint a demurrer was interposed and

a judgment of dismissal entered. Much learning has been expended in the brief of counsel for the appellant to demonstrate the sufficiency of a plea setting up this fact as one containing the defense of *res adjudicata*. It will be conceded that a judgment of dismissal of a bill in equity, unless there be a reservation that the dismissal is to be without prejudice, will be assumed to have been made upon the merits, and as between parties and privies will be a bar to any further litigation on the same subject-matter. However true this is, the judgment in that case is no bar to the present suit, since there is lacking one element essential to the bar, viz., privity. Privity is defined by Greenleaf as a term which "denotes mutual or successive relationship to the same rights of property." 1 Greenleaf on Evidence, § 189.

That learned authority well illustrates the different sorts of privies which may exist, and classes them generally like all other law writers and jurists as privies in estate, in blood and in law. He gives the usual illustrations of donor and donee, lessor and lessee, executor and testator, administrator and intestate. In general these classes embrace all the privies which are known to jurisprudence. It will be observed that the privity only exists because of the relationship between the parties, or because of the derivative character of their title. It would require a great stretch of the doctrine and the definition of the authorities on this subject to hold that successive executors and successive administrators and representatives of other sorts were privies in legal contemplation. Yet it was held by a very learned court in *Stacy v. Thrasher, etc.*, 6 How. 44, that the administrator *de bonis non* did so sustain that legal relation to his predecessor in the same trust, as to be bound, probably, by any judgments rendered against that predecessor. It was put in that case however on the principle and reason of an "official succession or privity." The rule cannot be extended beyond the doctrine of that case. Nothing but the very high respect accorded to the decisions of that very distinguished tribunal would ever lead me to adopt that conclusion. The administrator

de bonis non in no manner derives his title from his predecessor in trust, nor is there between them any sort of relationship save what may be said to spring from the fact that they both represent the same estate and have been appointed by the same judicial authority. It is possible to justify the holding on the ground that since the predecessor was a representative of the intestate whose estate ought to be bound by the adjudication, the successor in representation, coming in as he does in place of the decedent, shall be bound, because the estate which he represents ought to be concluded by the adjudication. To render the judgment conclusive, however, the present defendant, against whom it was rendered, must have held an official relation to the estate which he was found in possession of. The facts in the present suit prevent the adoption of this conclusion. Manahan, while he was named as an executor in the will of Everett, the decedent, never qualified as such, nor did he become in any sense the official representative of the deceased. He may have incurred some legal responsibility for the wrongful taking possession of the assets, but he did not so become the representative as to make a judgment obtained against him, or in his favor, conclusive for or against the estate. Between Manahan and Hummel there was no such official succession as to create the privity absolutely essential to the plea of *res adjudicata*.

The present suit was brought by the First National Bank of Central City against the administrator. A denial was interposed to the various allegations of the complaint, and it is insisted that this put in issue the corporate character of the plaintiff because it is a national bank doing business under the federal statutes within the limits of this state. The point was not raised in argument, nor does much reliance seem to be placed on it in the brief. These banks doing business within the limits of the state, and organized there, are not believed to be foreign corporations within the principle which requires proof of their corporate existence under a general denial, and the issue which that plea raises in this state.

No other questions were argued or relied upon in the briefs or at bar, and the preceding discussion has disposed of all questions remaining unsettled by the decision in the 14th Colorado, *supra*. The record presents no errors which necessitate a reversal of the judgment entered in favor of the bank, and it will accordingly be affirmed.

Affirmed.

INDEX.

ACTIONS:

1. ACTION AGAINST COUNTY—CUMULATIVE REMEDY.—One whose claim against a county has been presented to and disallowed by the board of county commissioners, has the right to elect to appeal from the decision of the board, or bring an independent action. *Com. Pitkin Co. v. Brown*, 473.

2. PRACTICE—CUMULATIVE REMEDY.—One whose claim against a county has been presented to and disallowed by the board of county commissioners, may, under the statute (Gen. Stats., secs. 546 and 547), either appeal to the district court or bring his action at law or in equity. His right to bring an action is not excluded by his statutory right of appeal from the decision of the board. *Com. Park Co. v. Locke*, 508.

3. ACTION, NATURE OF.—An action to foreclose a mechanics' lien is not, as to its principal basis, a proceeding *in rem*. *Davis v. John Mouat L. Co.*, 381.

4. PRACTICE.—A recovery can be had in an action for use and occupation where the defendant holds over after the expiration of his term. *Com. Pitkin Co. v. Brown*, 473.

5. PARTIES.—An action on an undertaking in attachment may be maintained against principal and sureties jointly, without first obtaining judgment against the principal. *Mattler v. Brind*, 439.

6. PRACTICE UNDER THE "TOWN SITE" ACT.—Pleadings and proceedings in actions to determine the right to receive a conveyance under the "Town Site" act are controlled by the chancery practice as modified by that act, and not by the civil code. *Rice v. Goodwin*, 267.

7. SAME.—The "Town Site" act is a special statute, and its provisions relating to practice are not repealed by implication by the civil code, which is general. *Ib.*

8. ACTION TO QUIET TITLE.—The Civil Code, sec. 255, which provides for action by one in possession of land by himself or tenant "against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim," does not authorize an action by one who has conveyed the legal title to the land but retains possession thereof. *Walker v. Pogue*, 149.

9. STATUTORY ACTION.—A party injured by fire set out or caused by the operating of a line of railroad, has an action for his damages, and is not required to avail himself of the provision of the act of March 31, 1887. *Denver T. & G. R. R. Co. v. De Graff*, 42.

ADMINISTRATOR: See **EXECUTOR AND ADMINISTRATOR.**

AGENCY: See **PRINCIPAL AND AGENT.**

AGREEMENT: See **CONTRACTS.**

ALIEN:

1. **ALIENS CANNOT LOCATE MINING CLAIMS.**—None but citizens of the United States and those who have declared their intention to become such, can acquire any right to public mineral lands by location. *Lee v. Justice Mining Co.*, 112.

2. **ASSIGNMENT OF LOCATION BY ALIEN.**—An alien cannot by assignment or conveyance to a citizen transfer any better or greater right than he himself possesses. *Ib.*

AMENDMENT:

1. **AMENDMENTS.**—A complaint may, in furtherance of justice and on such terms as may be proper, be amended by adding the name of a party plaintiff. *Rawles v. The People*, 501.

2. **PLEADING—AMENDMENT.**—A complaint which fails to allege the time when the note sued upon is payable may be amended, and unless such amendment is prejudicial to or prevents defendant from interposing a proper defense, a continuance of the cause, for the purpose of allowing defendant to amend its answer, will not be granted. *The Tribune P. Co. v. Hamill*, 237.

3. **SAME.**—Courts are liberal in allowing amendments when the cause of action is not changed, and where the complaint fails to state when the note sued on is payable, but the note is overdue, and the maker knows it to be the note he will be called upon to defend against, an amendment whereby the time of payment is inserted does not change the character of the action. *Ib.*

4. **AFFIDAVIT IN ATTACHMENT—DEFECTIVE.**—An affidavit in attachment which fails to state definitely the nature of the demand, is defective, but not so defective as to render the proceedings thereunder absolutely void because of the provision of the code permitting the amendment thereof. *Leppel v. Beck*, 390.

5. **AMENDMENT AFTER APPEAL.**—A court has power to vacate a judgment at the term at which it was rendered, and permit the pleadings in the case to be amended, notwithstanding an appeal from the judgment has been perfected. *Higgins v. The People*, 567.

6. **DISCRETION.**—The allowance of amendments to pleadings rests in the sound discretion of the court. *Ib.*

APPEALS:

1. **APPEAL—JURISDICTION.**—The supreme court being without jurisdiction to entertain the appeal, a transfer of the cause to court of appeals will not confer jurisdiction upon the latter. *Lowenbruck v. Denver & R. G. R. R. Co.*, 323.

2. **APPEAL—NONE FROM INTERLOCUTORY JUDGMENT.**—An interlocutory judgment is not appealable. *Hagerman v. Moore*, 83.

3. **APPEAL DOES NOT LIE, WHEN.**—The cause remaining undetermined in the court below as to the appellee's codefendants, there could be no final judgment with respect to him which would permit an appeal by the unsuccessful party prior to the determination of the entire suit. There can be but one judgment in an action from which an appeal may be taken. *Ib.*

4. **JURISDICTION.**—When the judgment appealed from does not amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold, neither the supreme court to which the appeal was taken, nor this court to which it was transferred, has jurisdiction to entertain it. *Stevenson v. Clarke*, 108.

APPELLATE PRACTICE:

1. **ABSTRACTS.**—If the appellant fails to file an abstract of the record prepared in substantial compliance with the 16th Rule of Court, his appeal may be dismissed. *Meyer v. Helland*, 209.

2. **BILL OF EXCEPTIONS—RECORD.**—When a bill of exceptions conflicts with the record entries in the case, the former must be taken as correct and the latter erroneous. *Atchison etc. R. R. Co. v. Denver*, 436.

3. **CONTEMPT PROCEEDINGS—REVIEW OF.**—The court upon review of contempt proceedings will limit its inquiry to the jurisdiction of the court below. If the facts disclosed by the record are sufficient to constitute a contempt, the court had jurisdiction and its orders will not be reviewed for mere errors. *Reeves v. The People*, 196.

4. **PRACTICE ON APPEAL.**—Assignments of error not argued by counsel in their briefs will not be considered by the court. *Perkins v. Peterson*, 242.

5. **SAME.**—An assignment of error cannot be predicated upon an instruction, to the giving of which no objection appears to have been made. *Brewster v. Crossland*, 446.

6. **SAME.**—A party cannot assign as error an instruction given at his request. *Denver v. Solomon*, 534.

7. **JUDGMENT—CLERICAL MISTAKE.**—When a judgment appears to have been entered by a clerical mistake, it will be reversed. *Atchison etc. R. R. Co. v. Denver*, 436.

8. **PRACTICE.**—In the absence of a bill of exceptions containing the evidence, assignments of error based upon rulings admitting testimony or as to the effect thereof will not be considered, but the sufficiency of the complaint may be the subject of inquiry. *Colo. Springs. etc. Co. v. Godding*, 1.

9. **SAME.**—One who has been made a party to an action and appeared without objection will not be heard, on error, to object, for the first time, that he was not a proper party. *Rawles v. The People*, 501.

10. **OBJECTIONS AND EXCEPTIONS, WHEN NECESSARY.**—No objection

to testimony will be considered on appeal when the evidence was admitted without objection or exception. *Edwards v. Harvey*, 109.

11. OBJECTIONS—EXCEPTIONS.—Rulings of the court below admitting or excluding evidence will not be considered on appeal, when the evidence was admitted without objection and no exceptions were saved. *Catlin Land etc. Co. v. Best*, 481.

12. ASSIGNMENTS OF ERROR NOT CONSIDERED, WHEN.—Assignments of error on admission of testimony, where specific objections to its admissibility were not made nor proper exceptions saved, will not be considered. *Farmers & M. Ins. Co. v. Nixon*, 265.

13. PRACTICE.—Questions as to misjoinder of parties defendant, not saved by the record, will not be considered on appeal. *Owl Canon Gypsum Co. v. Ferguson*, 219.

14. SAME.—An objection on the ground of nonjoinder of a party cannot be raised for the first time in this court. *Denver v. Soloman*, 534.

15. PRACTICE ON APPEAL.—The objection to a complaint that it is ambiguous and uncertain cannot be raised for the first time on appeal. *Com. Park Co. v. Locke*, 508.

16. PRACTICE IN ATTACHMENT.—Questions as to the sufficiency of an affidavit in attachment, not raised in the court below, will not be considered on review. *Rice v. Hauptman*, 565.

17. SAME.—Defects in an affidavit in attachment must be taken advantage of in the court below before trial upon the traverse. *Ib.*

18. WAIVER BY STIPULATION.—Parties stipulating that the trial upon the traverse in attachment may be had at a day later than the trial upon the merits, will not be heard to complain of irregularity in the order of proceeding in this respect. *Ib.*

19. NEW TRIAL NOT GRANTED, WHEN.—A judgment which is well supported by testimony will not be disturbed upon the ground that the finding was against the weight of the evidence. *Jones v. Montrose Mer. Co.*, 94.

20. VERDICT UPON CONFLICTING EVIDENCE.—The court will not interfere with the verdict when it appears that it was rendered upon conflicting testimony, and it does not appear that the evidence was not fairly considered by the jury. *Denver etc. R. R. Co. v. Richards*, 87.

21. CONFLICTING TESTIMONY—REVIEW OF.—Where the verdict rests on conflicting testimony, which would warrant the jury in reaching their conclusion, the verdict will not be disturbed. *Bice v. Hover*, 172.

22. VERDICT, WHEN CONCLUSIVE.—The court will not interfere with the finding of a jury on any question of fact where it is rendered on conflicting testimony. *Owl Canon Gypsum Co. v. Ferguson*, 219.

23. PRACTICE.—In cases where the testimony was taken before a referee and by him certified to the trial court, the appellate court will upon review examine the evidence and determine for itself the correctness of the findings of fact. *Childs v. Lowenbruck*, 92.

24. PROOF WANTING, JUDGMENT REVERSED.—In an action for goods

sold, the defendant set up as a defense that in the purchase he acted merely as the agent of other parties, but on the trial failed to introduce evidence in support of the pleading: *Held*, on appeal from a judgment in his favor, that it should be reversed, and further, that a reversal upon this ground does not violate the familiar rule that this court will not disturb a verdict rendered upon conflicting evidence. *Atlas Lumber Co. v. Schenck*, 246.

25. NEW TRIAL—FAILURE OF PROOF—GROUND FOR.—While appellate courts will not disturb a judgment upon a mere question of weight or preponderance of testimony, yet when there is an absence of proof on some point which is fundamental to the recovery, neither verdict nor judgment is conclusive upon the appellate tribunal, and a new trial will be ordered. *Victoria Gold M. Co. v. Fraser*, 14.

26. WRIT OF ERROR, WHEN DISMISSED.—It appearing from the record that a demurrer to the complaint had been sustained, but that no judgment had been entered thereon determining the rights of the parties, the court, on its own motion, dismissed the writ of error. *Mowbray v. Denver & R. G. R. Co.*, 128.

APPROPRIATIONS:

1. CONSTITUTIONAL LAW—JOINT RESOLUTIONS.—A mere joint resolution of the senate and house of representatives cannot empower the secretary of state to create a debt against the state. *Henderson v. Lithographing Co.*, 251.

2. SAME.—A joint resolution purporting to authorize the publication of the state engineer's report for distribution at the state's expense, not having been presented to the governor for his approval, is not included within any of the exceptions contained in sec. 39, art. 5, of the Constitution, dispensing with the concurrence of the executive, and is inoperative. *Ib.*

3. APPROPRIATIONS, HOW MADE.—Appropriations can be made only in the manner prescribed by the constitution. All appropriations for purposes other than the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt and for public schools are required by sec. 32, art. 5 of the Constitution to be by separate bills, each embracing but one subject. *Ib.*

4. JOINT RESOLUTIONS.—A joint resolution is not a bill within the meaning of the constitution, neither does its adoption constitute it a law. It would afford no justification to an officer for the payment of money, since the Constitution, sec. 33, art. 5, prohibits payment, except upon appropriations made by law. *Ib.*

ASSIGNMENTS:

1. ASSIGNMENT OF LOCATION BY ALIEN.—An alien cannot by assignment or conveyance to a citizen transfer any better or greater right than he himself possesses. *Lee v. Justice Mining Company*, 112.

2. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**—A deed of assignment for the benefit of creditors, to be valid, must show upon its face that it was intended to embrace all of the property of the assignor. *Palmer v. McCarthy*, 422.

3. **SAME.**—A failure to comply with the requirement of the statute with respect to a list of the creditors and an inventory of the estate under oath, will invalidate the deed of assignment. *Ib.*

4. **ASSIGNEE, WHEN NOT LIABLE.**—An assignee for the benefit of creditors is not chargeable with assets until he has become invested with them. *Elliott v. Hobbs*, 169.

5. **ASSIGNMENT, WHEN INEFFECTUAL.**—An assignment for the benefit of creditors which is accepted by the assignee conditionally, but repudiated before obtaining possession of assets or taking action in the premises, is ineffectual. *Ib.*

6. **ASSIGNMENT OF FUTURE EARNINGS.**—An employee having assigned his earnings or wages for a time to come, and his employer having accepted the assignment, the employer's liability is to the assignee, and garnishment cannot be maintained against him by a creditor of the assignor. *Denver T. & F. W. R. R. Co. v. Smeeton*, 126.

7. **SALE—WAREHOUSE RECEIPTS.**—Goods or property in store may be transferred by assignment and delivery of the warehouse receipt. *Hill v. Colo. Nat. Bank*, 324.

8. **SAME.**—The assignment and delivery of a warehouse receipt for goods in store is a constructive delivery of the goods which takes the place of the actual delivery required at common law. *Ib.*

ATTACHMENT:

1. **AFFIDAVIT IN ATTACHMENT—DEFECTIVE.**—An affidavit in attachment which fails to state definitely the nature of the demand is defective, but not so defective as to render the proceedings thereunder absolutely void because of the provision of the code permitting the amendment thereof. *Leppel v. Beck*, 390.

2. **SAME—COLLATERAL ATTACK.**—The sufficiency of the affidavit cannot be attacked collaterally by a third party. *Ib.*

3. **PRACTICE IN ATTACHMENT.**—Questions as to the sufficiency of an affidavit in attachment, not raised in the court below, will not be considered on review. *Rice v. Hauptman*, 565.

4. **SAME.**—Defects in an affidavit in attachment must be taken advantage of in the court below before trial upon the traverse. *Ib.*

5. **ATTACHING CREDITOR, RIGHTS OF.**—A creditor who causes an attachment to be levied on real estate, without notice of an unrecorded deed by the debtor, is entitled to all the protection afforded an innocent purchaser for value. *First Nat. Bank v. Campbell*, 271.

6. **PRO RATA DISTRIBUTION.**—When the statute providing for a *pro rata* distribution among attaching creditors was in force, the sheriff was

under no obligation to pay out the proceeds acquired under their attachments until so ordered by the court. *Rawles v. The People*, 501.

7. **WAIVER BY STIPULATION.**—Parties stipulating that the trial upon the traverse in attachment may be had at a day later than the trial upon the merits, will not be heard to complain of irregularity in the order of proceeding in this respect. *Rice v. Hauptman*, 565.

ATTORNEY AND CLIENT:

ATTORNEY AND CLIENT.—A client cannot maintain an action against her attorneys for alleged fraud in securing a compromise of a disputed claim, when it appears that but for the close attention of her counsel she would have received nothing, and that she agreed to the settlement after consultation with her father, even though she was a minor at the time. *Phillips v. Rhodes*, 70.

BANKS AND BANKING:

1. **BANKS—TRUST FUNDS.**—Moneys deposited or placed in bank for the payment of a draft become trust funds, applicable only to the payment of the bill, cannot be diverted from the purpose to which they were to be applied, and do not lose their character by being commingled with the general deposits. *Hummel v. First Nat. Bank of Central*, 571.

2. **SAME—ADMINISTRATOR'S INTEREST IN.**—Trust funds in bank may not be diverted to other uses than those designated, do not become the property of the banker, and form no part of his estate. His administrator takes and holds them merely as a bailee. *Ib.*

3. **AGENCY.**—The relation of banker and correspondent for the purpose of collection is that of special agent to do a particular thing. *Ib.*

4. **PRINCIPAL AND AGENT—NOTICE.**—The principal is chargeable with the information acquired by his agent, whether he obtained it in the course of the transaction of his principal's business or otherwise, providing the knowledge is so acquired by him as to be presumptively within his recollection when he is acting on behalf of the principal. *Ib.*

5. **NATIONAL BANK—PRACTICE.**—A national bank organized to do business in this state is not a foreign corporation within the rule which requires proof of corporate existence under a general denial. *Ib.*

BILL OF EXCEPTIONS:

When a bill of exceptions conflicts with the record entries in the case, the former must be taken as correct and the latter erroneous. *Atchison etc. R. R. Co. v. Denver*, 436.

BONDS, BILLS AND NOTES: See COMMERCIAL PAPER.

BROKER'S COMPENSATION:

1. **BROKER'S COMPENSATION.**—A broker is entitled to compensation for his services, when his efforts to bring about a trade, or negotiate a sale of property have been successful, and an alteration of the original terms by, or with the consent of his employer, will not deprive him of his right to compensation. *Carson v. Baker*, 248.

2. **BROKER'S COMMISSIONS, WHEN EARNED.**—When a broker who is employed to sell property finds a purchaser who is ready, willing and able to buy upon the terms specified in the contract of employment, he is entitled to recover his stipulated commissions. *Owl Canon Gypsum Co. v. Ferguson*, 219.

BURDEN OF PROOF :

1. **BURDEN OF PROOF.**—When the allegations of the complaint in an action for damages for a breach of covenant of seizin are denied, the burden of proof is upon the plaintiff. *Landt v. Major*, 551.

2. **SAME.**—The burden of proof is generally upon the party holding the affirmative of the issue. *Ib.*

3. **ASSIGNEE MUST GIVE NOTICE.**—If the assignee of such paper fails to give the payor notice of its assignment, the payor will not be precluded from setting up a defense growing out of his subsequent dealings with the original payee. The burden and duty of giving notice of the assignment devolves upon the assignee. *Drennon v. Ross*, 181.

4. **EVIDENCE—BURDEN OF PROOF.**—An objection to the introduction of an ordinance in evidence on the ground that the “ayes and nays had not been called upon its passage,” must be supported by the proof of such fact, otherwise the objection will not be sustained. *Metcalf v. The People*, 262.

5. **FRAUD—BURDEN OF PROOF—PRESUMPTION.**—If fraud on the part of the assured is set up in avoidance of the policy, the insurer must establish it by competent affirmative evidence, as it will be presumed that the assured acted honestly and in good faith. *Wich v. Equitable, etc., Ins. Co.*, 484.

6. **BURDEN OF PROOF.**—When the insurer sets up want of title in the assured, the burden of proof devolves upon him of establishing, not only that the assured had no title to the property, but also that he had no insurable interest therein. *Ib.*

7. **BURDEN OF PROOF.**—When issue is joined upon a garnishee's indebtedness, the burden of proof is upon the attaching creditor. *Denver T. & F. W. R. R. Co. v. Smeeton*, 126.

8. **BURDEN OF PROOF.**—A member of a non-trading firm cannot, without express authority, bind his copartner by the execution of a note unless it is necessary to the transaction of the partnership business, or there be a custom in that class of business from which the law implies such authority.

The burden of proving whatever is essential to give rise to the liability in such a case rests upon the party who brings the action. *Tanner v. Hyde*, 443.

CHATTEL MORTGAGE :

CHATTEL MORTGAGE—DILIGENCE—FRAUD.—The mortgagee of chattels must take possession of the property upon default in payment of

the debt. Suffering it to remain in the possession of the mortgagor after maturity is, as against creditors, fraudulent *per se*, and not subject to explanation. *Elliott v. First Nat. Bank*, 164.

CITIES AND TOWNS : See MUNICIPAL CORPORATIONS.

CITY ORDINANCE : See ORDINANCES.

COMMERCIAL PAPER :

1. **NEGOTIABLE PAPER—TIME CHECKS.**—Time checks are negotiable, and the assignee thereof may maintain an action thereon in his own name, free from any defense growing out of transactions between the original parties after notice of assignment. *Drennon v. Ross*, 181.

2. **ASSIGNEE MUST GIVE NOTICE.**—If the assignee of such paper fails to give the payor notice of its assignment, the payor will not be precluded from setting up a defense growing out of his subsequent dealings with the original payee. The burden and duty of giving notice of the assignment devolves upon the assignee. *Ib.*

3. **GARNISHMENT—PAYMENT WITHOUT NOTICE.**—After giving a time check, the payor was garnished as a debtor of the payee, and, without notice of assignment, answered, admitting indebtedness in the amount of the check. Judgment was entered against him and paid: *Held*, an ample defense to a suit by the assignee to recover upon the check. *Ib.*

COMPROMISE:

OFFERS TO COMPROMISE.—An unaccepted offer to compromise is not admissible in evidence. *The Denver T. & G. R. R. Co. v. De Graff*, 42.

CONFLICT OF LAWS:

1. **LEX LOCI CONTRACTUS.**—A contract which by the law of the place where made is valid *inter partes* and as against third persons, is valid in this state, notwithstanding it would have been adjudged invalid if it had been entered into within its jurisdiction. *Harper v. The People*, 177.

2. **SAME—CONDITIONAL SALE.**—In this state there can be, as against third persons, no sale of personal property with a valid reservation of the title or lien for the benefit of the vendor, nevertheless such conditions in the sale of property in a state where they are allowable will, upon the removal of the property into this state, be upheld. *Ib.*

CONDEMNATION PROCEEDINGS: See EMINENT DOMAIN.

CONSIDERATION:

1. **CONSIDERATION—LOVE AND AFFECTION.**—When the parties to a conveyance of real estate are husband and wife, love and affection may be a sufficient consideration between the parties, but it is not a good consideration, nor does the deed pass title when such result would be in fraud of existing creditors. *Phillips v. Rhodes*, 70.

2. **SPECIFIC PERFORMANCE.**—A contract to be specifically enforced must be definite and certain and upon a valuable consideration.

A promise against a promise is not, in this class of cases, a good

consideration, nor does a seal import a consideration. *Winter v. Goebner*, 259.

CONSIGNOR AND CONSIGNEE:

1. **CONSIGNMENT.**—D, having bought a quantity of soap of the plaintiff, was induced to take on consignment one hundred and fifty additional cases, to be accounted for at the rate of \$3.25 per case, if he succeeded in selling it, and he agreed that plaintiff might draw for the amount of the soap account at ninety days,—the draft to be accepted for plaintiff's accommodation, but at maturity should be paid only to the extent of sales by D from the one hundred and fifty cases. None of the soap consigned to D was sold by him, and the draft was returned unpaid. The one hundred and fifty cases of soap were never commingled with D's general stock: *Held*, that the title to the soap remained in the plaintiff as against attaching creditors of D. *The Colorado Soap Co. v. Burns*, 89.

2. **CONSIGNMENT—BILL OF LADING.**—Ordinarily, the consignor's ownership in goods ceases upon the shipment and transmission of a bill of lading, unless under special circumstances the right of stoppage *in transitu* is resorted to, and if the property is lost, the burden falls upon the consignee. *The Westman Mercantile Co. v. Park*, 545.

CONSTITUTIONAL LAW:

1. **APPROPRIATIONS, HOW MADE.**—Appropriations can be made only in the manner prescribed by the constitution. All appropriations for purposes other than the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt and for public schools are required by sec. 32, art. 5 of the Constitution to be by separate bills, each embracing but one subject. *Henderson v. Collier & C. Lithographing Co.*, 251.

2. **JOINT RESOLUTIONS.**—A joint resolution is not a bill within the meaning of the constitution, neither does its adoption constitute it a law. It would afford no justification to an officer for the payment of money, since the Constitution, sec. 33, art. 5, prohibits payment except upon appropriations made by law. *Ib.*

3. **CONSTITUTIONAL LAW—JOINT RESOLUTIONS.**—A mere joint resolution of the senate and house of representatives cannot empower the secretary of state to create a debt against the state. *Ib.*

4. **SAME.**—A joint resolution purporting to authorize the publication of the state engineer's report for distribution at the state's expense, not having been presented to the governor for his approval, is not included with any of the exceptions contained in sec. 39, art. 5 of the Constitution, dispensing with the concurrence of the executive, and is inoperative. *Ib.*

5. **COURT OF APPEALS—CONSTITUTIONAL LAW.**—The judgment of this court upon constitutional questions is not conclusive, but is subject to review by the supreme court. *Ib.*

6. CONSTITUTIONAL LAW.—Sec. 3712, Mills' An. Stats., fixing upon railroad companies an absolute liability for damages for all stock injured or killed, and sec. 3713, which provides for a recovery of double the appraised value of the animals injured or killed, with a reasonable attorney's fee in case of failure to pay the appraised value within the time prescribed, are unconstitutional and void. *Denver & R. G. Railway Co. v. Outcalt*, 395; *Denver & R. G. Railway Co. v. Davidson*, 443.

7. CONSTITUTIONAL LAW.—Sec. 2798, Gen. Stats., providing "that every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fire that is set out or caused by operating its line of road, or any part thereof, and such damages may be recovered by the party damaged, by the proper action in any court of competent jurisdiction," held, constitutional, under the authority of *U. P. Ry. Co. v. De Busk*, 12 Colo. 296. *The Union Pacific Ry. Co. v. Arthur*, 159.

8. CONSTITUTIONAL LAW—TITLE OF ACT.—An act entitled "An Act to amend chapter 24 of the General Laws of Colorado, entitled Criminal Code," complies with the provision of the Constitution (art. 5, sec. 21) that a bill shall contain but one subject, which shall be clearly expressed in its title. *Heller v. The People*, 459.

9. SAME.—An act so entitled is not repugnant to the constitution on the ground that it extends the operation of the statute to persons and transactions not theretofore included. *Ib.*

10. SAME.—Whenever the matter contained in a statute may fairly be considered germane to the subject expressed by its title, it is sufficient. *Ib.*

11. CONSTITUTIONAL LAW—TAXATION.—The Constitution (art. 10, sec. 3) requires uniformity of taxation upon valuation. *The Denver City Ry. Co. v. City of Denver*, 84.

12. CONSTITUTIONAL CONSTRUCTION.—A rule or mode of taxation of property having been prescribed by the constitution, all others are thereby excluded. *Ib.*

CONTEMPT:

1. CONTEMPT—FACTS CONSTITUTING.—M. intervened in a replevin suit, claiming to be entitled to the property in controversy. Judgment passed against him as well as the defendant and in favor of the plaintiff. Knowing the result of the action, he, with the aid of R., clandestinely took the property and removed it without the jurisdiction of the court before its order could be complied with: Held, that such facts constitute a contempt and that the court below had jurisdiction to impose a penalty. *Reeves v. The People*, 106.

2. DISOBEDIENCE OF VOID WRIT NOT A CONTEMPT.—A failure or refusal to obey a void writ of injunction does not constitute a contempt of court. *Smith v. The People*, 99.

3. IRREGULAR AND VOID WRITS, DISTINCTION BETWEEN.—There is a

well defined distinction between a writ of injunction improvidently or erroneously issued by a court having jurisdiction, and one issued by a court without it. In the one case the writ must be obeyed implicitly, no matter how improvidently or erroneously issued; in the other the writ is absolutely void, entitled to no respect and demanding no attention. *Ib.*

4. CONTEMPT PROCEEDINGS—REVIEW OF.—The court upon review of contempt proceedings will limit its inquiry to the jurisdiction of the court below. If the facts disclosed by the record are sufficient to constitute a contempt, the court had jurisdiction and its orders will not be reviewed for mere errors. *Reeves v. The People*, 196.

CONTRIBUTORY NEGLIGENCE: See NEGLIGENCE.

CONTRACTS.

1. CONTRACT FOR SATISFACTORY SERVICE—HOW CONSTRUED.—The appellee entered into a contract with the appellants, by which he was employed for one year at a stated monthly salary, and by which he agreed to give his entire attention to the business in which he was employed, and “to render good and satisfactory service;” *held* that his employers might discharge him at any time his services were unsatisfactory to them, without incurring liability in damages. The contract required performance not only of such services as his employers ought to have been satisfied with, but such as actually were satisfactory to them. *Bush v. Koll*, 48.

2. CONTRACTS — PART PERFORMANCE — RECOUPMENT.—A contract providing for the delivery of 1,500,000 feet of lumber to be delivered in lots, monthly, and to be paid for as received, is severable, and failure to deliver all the lumber specified in the contract will not preclude a recovery for the amount actually delivered, but any damage resulting from such failure or occasioned by the breach may be set off or recouped. *Gomer v. McPhee*, 287.

3. SAME—SEVERABLE.—It is not the multiplicity of items in a contract which determines its severable or non-severable character, but its object. *Ib.*

4. PROSPECTING CONTRACT—INTEREST ACQUIRED.—Two parties entered into an agreement to do prospecting work which contemplated a joint prosecution of the enterprise until a valid location was made. One quit the work before the discovery of mineral and the other carried it on until a discovery and a valid location was made: *Held*, that no interest in the property vested in him who had retired, unless he had provided therefor by an agreement with the discoverer. *McLaughlin v. Thompson*, 135.

5. CONTRACT RELEASING DAMAGES, HOW CONSTRUED.—A contract releasing the ditch company from damages by reason of unavoidable accidents and breaks of the canal would not cover a case of gross and continued negligence. *Catlin Land & C. Co. v. Best*, 481.

6. **CONTRACT THROUGH AGENT.**—Persons dealing with a corporation through an agent must, at their peril, advise themselves as to the scope of the agency and powers of the agent. *Victoria Gold M. Co. v. Fraser*, 14.

7. **AGENT—WHAT POWERS NOT PRESUMED.**—The general manager of a mining and milling company has no power, by virtue of his office, to bind the company by contracts for the purchase of machinery. *Ib.*

8. **LEX LOCI CONTRACTUS.**—A contract which by the law of the place where made is valid *inter partes* and as against third persons, is valid in this state notwithstanding it would have been adjudged invalid if it had been entered into within its jurisdiction. *Harper v. The People*, 177.

9. **SAME—CONDITIONAL SALE.**—In this state there can be as against third persons no sale of personal property with a valid reservation of the title or lien for the benefit of the vendor; nevertheless, such conditions in the sale of property in a state where they are allowable will, upon the removal of the property into this state, be upheld. *Ib.*

10. In the absence of limitation upon the power and discretion which the agent may exercise in regard to location, price, terms or time of payment in the purchase of real estate, the principal will be bound by the contract of the agent, and cannot recover any part of the purchase money paid upon the contract. *The Boulder Investment Co. v. Fries*, 373.

CONVEYANCE:

CONSIDERATION—LOVE AND AFFECTION.—When the parties to a conveyance of real estate are husband and wife, love and affection may be a sufficient consideration between the parties, but it is not a good consideration, nor does the deed pass title when such result would be in fraud of existing creditors. *Phillips v. Rhodes*, 70.

CORPORATIONS: See MUNICIPAL CORPORATIONS.

COSTS:

Where parties are forced to institute an action to obtain credit for a sum admitted to have been paid, the costs should not be taxed against them. *Madeley v. White*, 408.

COUNTIES: See MUNICIPAL CORPORATIONS.

COURTS:

JURISDICTION OF THE COURT OF APPEALS.—The court of appeals is not a court of final jurisdiction when constitutional questions are involved. Its judgment upon such questions is subject to review by the Supreme Court. *The Denver City Ry. Co. v. City of Denver*, 34; *Henderson v. The Collier & C. Lithographing Co.*, 251.

CRIMINAL LAW:

1. **FORGERY—VOID WARRANT.**—Forgery cannot be predicated upon an instrument which, by reason of noncompliance with statutory requirements, is void upon its face. *Raymond v. The People*, 329.

2. **CRIMINAL NEGLIGENCE.**—Criminal responsibility will attach for

the grossly negligent performance of a lawful act, but the neglected duty must be a plain one concerning which there is a general consensus of opinion, and the party charged must have been under some contractual or legal obligation to perform that which he omitted to do, and the omission to perform it must have been so grossly negligent that the law will impute criminal intent. *Thomas v. The People*, 518.

CUSTOM:

CUSTOM.—If there was a custom among merchant tailors and their employees requiring the latter to return garments for inspection before receiving compensation for their labor, the presumption obtains that the contract of employment was entered into with reference to it. Such a custom is reasonable and in no wise interferes with the lien of mechanics. *Hillsburg v. Harrison*, 298.

DAMAGES:

1. TELEGRAPH COMPANY, LIABILITY OF.—A telegraph company failing to deliver a telegram is liable for such loss or injury as is the direct, natural and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the message. *Western Union Tel. Co. v. Cornwell*, 491.

2. DAMAGES.—Speculative, contingent and remote damages, which cannot be directly traced to a breach of contract or negligence on part of the company, cannot be recovered for a failure to deliver the message. *Ib.*

3. NOMINAL DAMAGES.—When the company is not made aware of the purport or importance of a message, and contracts without full knowledge of its importance, and loss is occasioned by failure or negligence of the company in the transmission or delivery, only nominal damage, or the price paid for transmitting the message can be recovered. *Ib.*

4. NEGLIGENCE.—Owners of ditches are liable in damages resulting from their neglect to carefully maintain and keep the embankments of their ditches in good repair. *The Catlin Land & C. Co. v. Best*, 481.

5. CONTRACT RELEASING DAMAGES, HOW CONSTRUED.—A contract releasing the ditch company from damages by reason of unavoidable accidents and breaks of the canal would not cover a case of gross and continued negligence. *Ib.*

DEBTOR AND CREDITOR:

1. DECEDENT'S DEBT, WHEN CHARGEABLE TO WIDOW.—A widow of a deceased debtor can be made liable for his debt only by an assumption thereof and an absolute promise, upon a consideration to pay it, or by reason of her succeeding to the estate of her husband and failure to pay the debt. *Bohm v. Hoffer*, 146.

2. ATTACHING CREDITOR, RIGHTS OF.—A creditor who causes an attachment to be levied on real estate, without notice of an unrecorded

deed by the debtor is entitled to all the protection afforded an innocent purchaser for value. *First Nat. Bank v. Campbell*, 271.

3. **REDEMPTION—VOID SALE.**—A judgment creditor who has paid money to the sheriff for the purpose of redeeming property from a sale may, upon ascertaining that the sale was void, recover the money so paid, in an action against the sheriff commenced while the fund was still in his hands. *Brown v. Hunter*, 527.

DECREE: See **JUDGMENT AND DECREE.**

DEFENSES:

1. **DEFENSE—FAILURE OF CONSIDERATION.**—The defendant in an action on a promissory note may always, while the note remains the property of the payee, avail himself of the defense that it was given without consideration. *The Sioux City Nursery, etc., Co. v. Carlton*, 157.

2. **SETTLEMENT—DUE BILL—PROOF.**—Where, in seeking to defeat recovery of the amount of a due bill given in a settlement, defendants failed to state or plead that what they proposed to prove was not known and fully understood by them at the time of settlement and delivery of the bill, such proof is properly rejected. *Buno v. Gabriel*, 295.

3. **DUE BILL—DEFENSE.**—To warrant the admission of such testimony defendants must interpose the defense of a breach of contract, and show, or offer to show, that the due bill was executed by them upon a misrepresentation of facts, against which they were not in position to guard themselves. *Ib.*

DEFINITIONS:

MECHANIC—WHO IS.—A tailor to whom cloth has been delivered to be made into garments is a mechanic. *Hillsburg v. Harrison*, 298.

DISCRETION: See also **PRACTICE IN CIVIL ACTIONS:**

1. **DISCRETION.**—The allowance of amendments to pleadings rests in the sound discretion of the court. *Higgins v. The People*, 567.

2. **PRACTICE—DISCRETION.**—The conduct of the trial and control of counsel is so fully within the discretion of the trial court, that its action in this respect will not be reviewed unless it is manifest that discretion has been plainly and grossly abused. *Felt v. Cleghorn*, 4; *Hill v. Colorado Nat. Bank*, 324.

3. **SPECIAL COUNSEL FOR THE PEOPLE.**—The trial court may in the exercise of sound discretion appoint one or more attorneys to assist the district attorney in the prosecution of criminal cases, and its action in this respect will not be reviewed, except where a clear abuse of discretion is made apparent. *Raymond v. The People*, 329.

4. **SUMMONS.**—When summons is not issued within thirty days after complaint was filed, the suit was properly dismissed on special appearance of defendant for the purpose of such motion, and the motion is not addressed to the discretion of the court. *Steves v. Carson*, 200.

DITCHES AND DITCH COMPANIES:

1. **DITCHES—VESTED RIGHTS.**—A ditch for beneficial purposes was constructed across land which at the time was parcel of the public domain of the United States and before the land was included by the city limits, and has been maintained and operated ever since: *Held*, that its owner has a vested right to the use and enjoyment thereof. *The Platte & D. C. & M. Co. v. Lee*, 184.

2. **NEGLIGENCE.**—Owners of ditches are liable in damages resulting from their neglect to carefully maintain and keep the embankments of their ditches in good repair. *The Catlin Land & C. Co. v. Best*, 481.

3. **CONTRACT RELEASING DAMAGES, HOW CONSTRUED.**—A contract releasing the ditch company from damages by reason of unavoidable accidents and breaks of the canal would not cover a case of gross and continued negligence. *Ib.*

DIVORCE :

1. **DIVORCE—ADULTERY A BAR.**—The plaintiff's action for divorce was upon the grounds of desertion and nonsupport. Defendant joined issue and also filed a cross-complaint upon the ground of the plaintiff's adultery. The proofs showed the defendant to be guilty of desertion and nonsupport, and the plaintiff to be guilty of adultery: *Held*, that both complaint and cross-complaint should have been dismissed. *Redington v. Redington*, 8.

2. **PRACTICE IN DIVORCE CASES.**—It is of no consequence how the court obtains the requisite legal knowledge of the fact of plaintiff's adultery. It may crop out of the proofs without having been pleaded, but must be acted upon by the court. If it shall appear, no divorce can be decreed. *Ib.*

3. **GROUND OF DIVORCE—EQUALITY OF.**—In estimation of law, all grounds of divorce are of equal force and validity, notwithstanding supposed differences, in point of morals, in the gravity of the offenses involved. *Ib.*

EMINENT DOMAIN :

1. **PRACTICE—EMINENT DOMAIN.**—In a proceeding under the "Eminent Domain Act" a petition filed in vacation should be presented to the judge in order that he may comply with the provisions of the statute, requiring him to note thereon the day of presentation, etc. Upon presentation thereof he shall order summons issued, and the clerk shall at once issue the same. *Colorado Midland Ry. Co. v. Ruedi*, 202.

2. **SAME.**—After a postponement of the issuance of summons until the rights, title or interest of respondent in and to the premises, sought to be condemned, have been determined, without a showing by supplemental proceeding or petition indicating to the court that such interests have been determined, and what such interests are: *Held*, sufficient to support a motion dismissing the proceeding. *Ib.*

3. **PROCEEDING LIMITED.**—Proceedings in condemnation can only be

instituted under the particular statutes which warrant them, and the right is limited to those who seek to take the property belonging to others. *Ib.*

4. PRACTICE IN EMINENT DOMAIN PROCEEDINGS.—Under the eminent domain act, the question of necessity for taking the property for municipal purposes is not for the jury to determine,—that being wholly within the province of the municipal authorities. *Warner v. The Town of Gunnison*, 430.

5. SAME.—The issues in a condemnation proceeding may be tried either in term time or vacation. When tried to a jury in term time, it must be before the jury drawn in the ordinary way to serve at that term. *Ib.*

6. EMINENT DOMAIN.—Cities and towns are authorized to exercise the right of eminent domain, by condemning private property for public uses. To supply water for the use of a community is one of the duties imposed on a municipality, and property taken for that purpose is taken for a public use. *Ib.*

7. SAME.—A town or city may, for the purpose of supplying its inhabitants with water, exercise the right of eminent domain by condemning private property without the corporate limits. *Ib.*

EQUITY :

1. CANCELATION OF DEEDS, WHEN NOT DECREED.—The complaint showed that the state had held the fee to a portion of a certain "school section," that it had been leased to D. who transferred the leasehold interest to B., by whom valuable improvements were made upon the premises. That defendant T. applied to the land board to purchase the premises, and, in his application, made many false representations as to the value of the improvements, the condition of the premises and their abandonment. That, without an appraisal of the improvements, the land was patented to him, he paying to the board for the benefit of the owner of the improvements (in addition to the purchase price) \$150, the amount he represented their value to be. The relief demanded was the cancelation of the patent to T. and various mesne conveyances by him and his grantees;—to the end, apparently, that the board and T. might be compelled to protect B. in his improvements and secure the payment of their value: *Held*, that no cause of action was stated in favor of the people. *The People v. Tynon*, 131.

2. FRAUD.—A conveyance obtained fraudulently and deeds executed by the conspirators in furtherance of the fraud will be canceled at the suit of the party defrauded, and this result will not be prevented by a voluntary conveyance by the conspirators to one who had no actual knowledge of the fraud. *Reddin v. Dunn*, 518.

3. CORPORATE LOANS — MISAPPLICATION. — A misapplication and waste of money received by a corporation is not a ground for invalidat-

ing the security upon which the loan was obtained.—*Robinson v. Dolores, etc., Canal Co.*, 17.

4. **UNDUE INFLUENCE—EQUITY.**—Where a transaction is the result of moral, social or domestic force exerted upon a party, controlling free action of his will and preventing any true consent, equity may relieve against it on the ground of undue influence. *Lighthall v. Moore*, 554.

5. **SAME.**—It is a constant rule in equity that where a party is not a free agent and is not equal to protecting himself, the court will protect him. *Ib.*

6. **SAME.**—A party in another's power may have canceled an inequitable bargain to which he was entrapped or practically compelled, though there may have been neither technical fraud nor technical duress. *Ib.*

7. **LACHES.**—Reasonable diligence is always necessary to move a court of equity. The strongest equity may be forfeited by laches or abandoned by acquiescence. *McLaughlin v. Thompson*, 135.

8. **LACHES.**—A delay of seven years to bring an appropriate action to recover his interest in a mining claim is an equitable bar to an action, where the plaintiff had failed to contribute labor or money to the enterprise, even if the discovery was made by one with whom he had a contract giving him such interest. *Ib.*

ESTATES:

1. **ADMINISTRATOR'S INTEREST.**—Trust funds in bank may not be diverted to other uses than those designated, do not become the property of the banker, and form no part of his estate. His administrator takes and holds them merely as a bailee. *Hummel v. First Nat. Bank*, 579.

2. **PROBATE MATTERS—CLAIMS AGAINST ESTATES.**—Debts against an estate are only those contracted by the deceased. *Lusk v. Patterson*, 306.

3. **SAME.**—A debt contracted by the administratrix is not a debt against the estate. *Ib.*

4. **JUDGMENT AGAINST ESTATE—RIGHTS OF HOLDER.**—Where a judgment creditor of a solvent estate postpones enforcement of her judgment in consideration of an assignment to her of one of several notes secured by deed of trust and given to the heir for a debt due the estate, and it is agreed that upon the payment of the note and interest when due she will satisfy the judgment, she is not compelled to exhaust her remedy upon the note as a condition to her right to enforce the judgment against the heir. *Dowling v. Dowling*, 28.

5. **HEIR—LIABILITY OF.**—The heir into whose possession an estate has come is to be excused from the payment of its debts only upon showing an insufficiency of assets. *Ib.*

ESTOPPEL:

1. **ESTOPPEL.**—Where one of two innocent parties must suffer by the wrongful act of a third, it must be he who, by his conduct or silence, enables the wrongdoer to perpetrate the fraud. *Baker v. Riley*, 478.

2. **ESTOPPEL.** The doctrine of estoppel by election cannot be invoked by one who has suffered no disadvantage by reason of anything in the premises. *Dowling v. Dowling*, 28.

EVIDENCE:

1. **AGENCY—EVIDENCE OF AUTHORITY.**—To bind the principal to execute a conveyance of real estate, the authority of the agent to make the sale must be established. Such authority need not be under seal—need not be contained in a single instrument—may be deduced from letters and telegrams, but it is indispensable that the agency and authority be established. *Sullivan v. Leer*, 141.

2. **GENERAL AGENT—WHO IS—EVIDENCE OF.**—A person authorized to accept risks, to agree upon and settle the terms of insurance and to carry them into effect by issuing and renewing policies, is regarded as a general agent of the company pending negotiations.

The possession of blank policies and renewal receipts signed by the president and secretary of the company is evidence of such agency. *The Farmers & M. Ins. Co. v. Nixon*, 265.

3. **EVIDENCE.**—In an action by the assignee of certain claims, for the collection of the same, under the general issue, evidence offered by defendants to prove that a third person furnished the money with which the claims were purchased was properly rejected. *Jacobs v. Mitchell*, 456.

4. **EVIDENCE—BURDEN OF PROOF.**—An objection to the introduction of an ordinance in evidence on the ground that the "ayes and nays had not been called upon its passage," must be supported by proof of such fact, otherwise the objection will not be sustained. *Metcalf v. The People*, 262.

5. **DUE BILL—PROOF.**—Where, in seeking to defeat recovery of the amount of a due bill given in a settlement, defendants failed to state or plead that what they proposed to prove was not known and fully understood by them at the time of settlement and delivery of the bill, such proof is properly rejected. *Buno v. Gabriel*, 295.

6. **DUE BILL—DEFENSE.**—To warrant the admission of such testimony defendants must interpose the defense of a breach of contract, and show, or offer to show, that the due bill was executed by them upon a misrepresentation of facts, against which they were not in position to guard themselves. *Ib.*

7. **EVIDENCE.**—Where the testimony of a witness is discredited by evidence that he has made statements out of court inconsistent with his testimony, it is not competent for the purpose of sustaining him to prove that at other times he made, out of court, statements which are consistent with his testimony. *Davis v. Graham*, 210.

8. **EVIDENCE—WHAT IS NOT.**—The mere fact that the property was purchased at execution sale by the creditors for less than its estimated

value, is not evidence of a conspiracy to deprive the plaintiff of her rights therein. *Phillips v. Rhodes*, 70.

9. EVIDENCE.—In an action upon a written instrument, testimony as to conversations and negotiations which preceded and led up to the contract, must be excluded, upon the principle that all such antecedent matters are merged in the writing or disposed of by it, but this rule is not applicable when the issue is as to the existence of probable cause justifying criminal proceedings. *Whitehead v. Jessup*, 76.

10. EVIDENCE OF FACTS, NOT ADMISSIBLE WITHOUT PLEADING.—Evidence of facts not pleaded is not admissible, and if admitted will not support a decree. *McLaughlin v. Thompson*, 135.

11. FINDINGS OF FACT MUST BE UPON EVIDENCE.—The convictions of the judge based upon personal observations cannot take the place of competent evidence. *The Denver City Ry. Co. v. Denver*, 34.

12. EVIDENCE—MINING PARTNERSHIP.—Deeds and contracts between parties, although insufficient in themselves to show a mining partnership, may, nevertheless, be admissible as elements of proof to fix liability upon the parties as partners. *Perkins v. Peterson*, 242.

13. JUDGMENT WHEN ADMISSIBLE IN EVIDENCE.—In an action on an account, evidence of a judgment previously obtained by the plaintiff against the defendant, included in the account, is admissible, where it appears that the judgment was obtained at the request of the defendant, and upon an understanding that he was to pay a certain portion monthly and not to be pressed for payment in full. *Edwards v. Harvey*, 109.

14. OFFERS TO COMPROMISE.—An unaccepted offer to compromise is not admissible in evidence. *The Denver T. & G. Ry. Co. v. De Graff*, 43.

15. PAROL EVIDENCE INADMISSIBLE, WHEN.—Parol evidence is inadmissible to show that property, not described in the deed of assignment or in the inventory, was intended to pass under the deed. *Palmer v. McCarthy*, 422.

16. POLICY—PRIMA FACIE EVIDENCE.—A policy issued to a person is *prima facie* evidence of his title to the premises, and, unless questioned, is conclusive. *Wich v. The Equitable F. & M. Ins. Co.*, 484.

17. PROOF, QUANTUM OF.—In cases of this kind, juries should not be allowed to infer or presume, for want of positive proof to the contrary, that the fire was communicated by the operating of the railroad. The proof required upon this point must be sufficient to exclude the probability of the fire having been caused by some other means. *The Denver T. & G. Ry. Co. v. De Graff*, 43.

18. EVIDENCE—RESULTING TRUST.—Parol evidence is competent to prove a resulting trust. Such a trust must result, if at all, at the instant the deed is taken and the legal title vests in the grantee. *The First Nat. Bank v. Campbell*, 271.

19. PROOF—QUANTUM OF.—Unquestionable evidence is required to

establish a resulting trust. Whatever is essential to exhibit the equity of the *cestui que trust* must appear in a clear and unclouded light. *Ib.*

20. WRITTEN ASSIGNMENT, WHEN NOT REQUIRED.—The plaintiff being the owner by actual purchase of the claims sued on, need not, in order to recover, show a written assignment thereof. *Perkins v. Peterson*, 242.

EXECUTIONS:

1. EXECUTION—HOW LEVIED.—An officer seeking to satisfy a writ against a member of a firm out of partnership property should take the firm goods into his custody, sell the debtor's undivided interest therein, and put the purchaser into the joint possession of the property sold. *Felt v. Cleghorn*, 4.

2. LEVY—WHEN NEED NOT BE UPON ALL FIRM EFFECTS.—An officer is not required to seize all the partnership property, under process, against one of the members of the firm, when a sale of the interest of that partner in a portion of it will satisfy the writ. *Ib.*

EXECUTOR AND ADMINISTRATOR:

1. ADMINISTRATOR'S INTEREST.—Trust funds in bank may not be diverted to other uses than those designated, do not become the property of the banker, and form no part of his estate. His administrator takes and holds them merely as a bailee. *Hummel v. First Nat. Bank*, 571.

2. PROBATE MATTERS—CLAIMS AGAINST ESTATES.—Debts against an estate are only those contracted by the deceased. *Lusk v. Patterson*, 306.

3. SAME.—A debt contracted by the administratrix is not a debt against the estate. *Ib.*

EXCEPTIONS: See APPELLATE PRACTICE.

EXEMPTIONS:

1. EXEMPTION—HOMESTEAD.—Every householder, being the head of a family, is by statute entitled to hold a homestead not exceeding in value \$2,000, exempt from execution and attachment arising from any debt, contract or civil obligation incurred after Feb. 1, 1862, provided he resides thereon and designates it of record as such as required by law. *Woodward v. People's Nat. Bank*, 369.

2. SAME—JUDGMENT LIEN.—The right to hold as a homestead a parcel of land, the title to which the occupant has acquired under the preemption laws, is not impaired by reason of the fact that a transcript of a judgment against him had been filed before he acquired title and designated the land as a homestead. *Ib.*

3. SAME.—A mere judgment lien upon land does not prevent the occupant from designating it as a homestead and holding it exempt from an execution issued upon the judgment after such designation. *Ib.*

FIXTURES: See LANDLORD AND TENANT.

FORECLOSURE: See LIENS.

FORGERY:

FORGERY—VOID WARRANT.—Forgery cannot be predicated upon an instrument which, by reason of noncompliance with statutory requirements, is void upon its face. *Raymond v. The People*, 329.

FRAUD. See also **STATUTE OF FRAUDS.**

FRAUD.—A conveyance obtained fraudulently and deeds executed by the conspirators in furtherance of the fraud will be canceled at the suit of the party defrauded, and this result will not be prevented by a voluntary conveyance by the conspirators to one who had no actual knowledge of the fraud. *Reddin v. Dunn*, 518.

GARNISHMENT:

1. **GARNISHMENT—PAYMENT WITHOUT NOTICE.**—After giving a time check, the payor was garnished as a debtor of the payee, and, without notice of assignment, answered, admitting indebtedness in the amount of the check. Judgment was entered against him and paid; *held*, an ample defense to a suit by the assignee to recover upon the check. *Drennon v. Ross*, 181.

2. **GARNISHMENT—PROOF.**—A creditor who attempts, by garnishment, to enforce an alleged liability of one who owes his debtor, must show by satisfactory proof that the garnishee is indebted to the judgment debtor. *The Denver, Tex. & F. W. R. R. Co. v. Smeeton*, 126.

3. **BURDEN OF PROOF.**—When issue is joined upon the garnishee's indebtedness, the burden of proof is upon the attaching creditor. *Ib.*

4. **ASSIGNMENT OF FUTURE EARNINGS.**—An employee having assigned his earnings or wages for a time to come, and his employer having accepted the assignment, the employer's liability is to the assignee, and garnishment cannot be maintained against him by a creditor of the assignor. *Ib.*

GUARDIAN AND WARD:

INFANTS—INCAPACITY OF.—Infants are incapable of consenting to anything prejudicial to their inheritance, and any consent given can be retracted after becoming of age. Their guardians have no power to bind them in such matters. *Lusk v. Patterson*, 306.

HOMESTEAD:

1. **EXEMPTION—HOMESTEAD.**—Every householder, being the head of a family, is by statute entitled to hold a homestead not exceeding in value \$2,000, exempt from execution and attachment arising from any debt, contract or civil obligation incurred after Feb. 1, 1862, provided he resides thereon and designates it of record as such as required by law. *Woodward v. Peoples Nat. Bank*, 369.

2. **SAME—JUDGMENT LIEN.**—The right to hold as a homestead a parcel of land, the title to which the occupant has acquired under the pre-emption laws, is not impaired by reason of the fact that a transcript of

a judgment against him had been filed before he acquired title and designated the land as a homestead. *Ib.*

3. SAME.—A mere judgment lien upon land does not prevent the occupant from designating it as a homestead and holding it exempt from an execution issued upon the judgment after such designation. *Ib.*

INDICTMENT:

1. INDICTMENT, WHEN SUFFICIENT.—An indictment stating the fact constituting the crime of embezzlement, but not designating the accused as bailee, trustee or agent, is sufficient. *Heller v. The People*, 459.

2. SAME.—It is not necessary in an indictment for embezzlement of a promissory note to describe the note with particularity. *Ib.*

INFANTS: See GUARDIAN AND WARD.

INJUNCTIONS:

1. PROSECUTION MAY BE ENJOINED, WHEN.—A city may be enjoined from prosecuting a property owner for violating an ordinance when such prosecution tends to impair vested rights in the property, or by reason of a multiplicity of suits inflicts irreparable injury without authority of law. *The Platte and D. C. & M. Co. v. Lee*, 184.

2. MANDATORY INJUNCTION WITHOUT NOTICE, VOID.—A mandatory writ of injunction issued without notice is absolutely void. *Smith v. The People*, 99.

3. IRREGULAR AND VOID WRITS, DISTINCTION BETWEEN.—There is a well defined distinction between a writ of injunction improvidently or erroneously issued by a court having jurisdiction, and one issued by a court without it. In the one case the writ must be obeyed implicitly, no matter how improvidently or erroneously issued; in the other the writ is absolutely void, entitled to no respect and demanding no attention. *Ib.*

4. DISOBEDIENCE OF VOID WRIT NOT A CONTEMPT.—A failure or refusal to obey a void writ of injunction does not constitute a contempt of court. *Ib.*

5. INJUNCTION NOT THE REMEDY.—An injunction cannot be maintained against a county treasurer to restrain him from collecting a tax by distraint of property on the ground that the assessment was erroneous or excessive. *Metcalf v. Fisher*, 375.

INSTRUCTIONS:

1. INSTRUCTIONS MUST BE IN WRITING.—It is error to instruct a jury orally. *Brown v. Crawford*, 235.

2. SAME, ERROR NOT CURED, WHEN.—At the trial objection was made to instructing the jury orally. The court, however, gave oral instructions, but directed the stenographer to note and extend those given. After argument the instructions were extended and signed by the judge. *Held*, that the error was not thereby cured. *Ib.*

3. PRACTICE—INSTRUCTIONS.—Objections to instructions should be made in such time and manner as to give the trial court an opportunity to correct the same, if found erroneous. General exceptions to instructions “in each and every part thereof” are insufficient. *Jacobs v. Mitchell*, 456.

4. SAME.—Oral instructions are within the above rule. *Ib.*

5. PRACTICE—INSTRUCTIONS.—It is not error to refuse to submit to the jury a question upon which there is no evidence. *The Westman Mercantile Co. v. Park*, 545.

6. PRACTICE—INSTRUCTIONS.—A failure to recognize an exception to a general rule stated in an instruction cannot be relied on as error unless the evidence tends to make a case within the exception. *Brewster v. Crossland*, 446.

INSURANCE:

1. INSURANCE—CHANGE OF TITLE.—The clause in a policy of insurance providing against a change in the interest, title or possession of the property insured, is not violated by a change, not in the fact of title, but only in the evidence thereof. If the change is merely nominal and not of a nature calculated to increase the danger of loss, the policy is not violated. *Wich v. The Equitable F. & M. Ins. Co.*, 484.

2. INSURANCE—INCORRECT STATEMENTS.—It is a good answer to a plea setting up as a breach of the condition of a policy that the interest and ownership of the assured in the property is incorrectly stated, to show that it was so stated by the mistake or wrongful act of the agent to whom the application was made, that he was fully advised as to the fact and was acting within the scope of his authority. *Ib.*

3. BURDEN OF PROOF.—When the insurer sets up want of title in the assured, the burden of proof devolves upon him of establishing, not only that the assured had no title to the property, but also that he had no insurable interest therein. *Ib.*

4. POLICY—PRIMA FACIE EVIDENCE.—A policy issued to a person is *prima facie* evidence of his title to the premises, and, unless questioned, is conclusive. *Ib.*

5. INSURANCE—OWNERSHIP.—The purchaser of real estate by contract is the equitable owner, and, for the purpose of insurance, may be said to be vested with the entire, unconditional and sole ownership of the property. *Ib.*

6. FRAUD—BURDEN OF PROOF—PRESUMPTION.—If fraud on the part of the assured is set up in avoidance of the policy, the insurer must establish it by competent affirmative evidence, as it will be presumed that the assured acted honestly and in good faith. *Ib.*

INTERVENTION: See PRACTICE IN CIVIL ACTIONS.

IRRIGATION: See WATER RIGHTS.

JUDGMENTS AND DECREES:

1. ORDER SUSTAINING DEMURRER IS NOT A FINAL JUDGMENT.—An

order sustaining a demurrer is not a final judgment from which an appeal can be taken, or to which a writ of error can be prosecuted. *Mowbray v. The Denver & R. G. R. R. Co.*, 128.

2. APPEAL DOES NOT LIE, WHEN.—The cause remaining undertermined in the court below as to the appellee's codefendants, there could be no final judgment with respect to him which would permit an appeal by the unsuccessful party prior to the determination of the entire suit. There can be but one judgment in an action from which an appeal may be taken. *Hagerman v. Moore*, 83.

3. JUDGMENT—CLERICAL MISTAKE.—When a judgment appears to have been entered by a clerical mistake, it will be reversed. *The Atchison T. & S. F. R. R. Co. v. Denver*, 436.

4. JUDGMENT—COLLATERAL ATTACK.—A judgment of a court of general jurisdiction cannot be attacked in a collateral proceeding. *Rawles v. The People*, 501.

5. PERSONAL JUDGMENT—JURISDICTION.—A personal judgment in an action upon a money demand against a nonresident, on whom personal service of process within the state has not been had and who did not appear, is without validity. *Davis v. The John Mouat L. Co.*, 381.

6. JUDGMENT AGAINST ESTATE—RIGHTS OF HOLDER.—Where a judgment creditor of a solvent estate postpones enforcement of her judgment in consideration of an assignment to her of one of several notes secured by deed of trust and given to the heir for a debt due the estate, and it is agreed that upon the payment of the note and interest when due, she will satisfy the judgment, she is not compelled to exhaust her remedy upon the note as a condition to her right to enforce the judgment against the heir. *Dowling v. Dowling*, 28.

JURISDICTION:

1. APPEAL—JURISDICTION.—The supreme court being without jurisdiction to entertain an appeal, a transfer of the cause to court of appeals will not confer jurisdiction upon the latter. *Lowenbruck v. The Denver & R. G. R. R. Co.*, 323.

2. JURISDICTION.—When the judgment appealed from does not amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold, neither the supreme court to which this appeal was taken, nor this court to which it was transferred, has jurisdiction to entertain the appeal. *Stevenson v. Clarke*, 108.

3. ADEQUACY OF REMEDY AT LAW.—A court of chancery has jurisdiction to decree the performance of a contract to convey real estate, regardless of the adequacy of an action at law. *Sullivan v. Leer*, 141.

4. COURT OF APPEALS.—The court of appeals is not a court of final jurisdiction when constitutional questions are involved. Its judgment upon such questions is subject to review by the supreme court. *The Denver City Ry. Co. v. Denver*, 34.

5. The judgment of the supreme court holding the constitutionality

of an act, remaining authoritative, the question is not open to review in this court. *The Union Pacific Ry. Co. v. Arthur*, 159.

6. COUNTY COURTS.—A county court has jurisdiction of an action on an official bond when the amount claimed does not exceed \$2,000, notwithstanding the penalty of the bond is in the sum of \$5,000. *Rawles v. The People*, 501.

7. COUNTY BOUNDARIES.—In an action between counties, under the act of 1887 (Sess. Laws, p. 238), to establish a boundary line, the court has jurisdiction to render judgment upon the evidence, and is not limited to a determination of the accuracy of the line run by the state engineer. *Gunnison Co. v. Saguache Co.*, 412.

8. JUSTICES OF THE PEACE.—Under sec. 1 of the act of 1885 (p. 372), which provides that all justices of the peace and police magistrates shall have jurisdiction of cases arising under any ordinances passed pursuant to that act, and that the city council, or a board of trustees, may designate one justice of the peace who shall have jurisdiction exclusively, justices of the peace are not divested of jurisdiction in the absence of an act by the town specially conferring exclusive jurisdiction on some particular justice. *Metcalf v. The People*, 262.

9. REPLEVIN.—The acceptance of an informal or insufficient undertaking, in an action of replevin, must be taken advantage of at the earliest practical opportunity, as such defective undertaking will not deprive the court of jurisdiction, nor in any way interfere with or void the proceeding. *Morris v. Hanson*, 154.

10. SUMMONS.—It is necessary that every material requirement of the statute concerning service of summons by publication be carefully and strictly pursued in order to give the court jurisdiction. *Davis v. The John Mouat L. Co.*, 381.

11. PERSONAL JUDGMENT—JURISDICTION.—A personal judgment in an action upon a money demand against a nonresident, on whom personal service of process within the state has not been had and who did not appear, is without validity. *Ib.*

12. VENUE—REAL ACTIONS.—It is provided by sec. 25 of the Civil Code that an action involving real estate shall be tried in the county in which the land or some part thereof is situate. *Smith v. The People*, 99.

13. VENUE.—If such an action is brought in the wrong county, the court cannot retain jurisdiction after motion in apt time by the defendant to change the place of trial to the county in which it ought to have been commenced. *Ib.*

14. CHANGE OF VENUE A PRIVILEGE.—The right to a change of place of trial in an action commenced in the wrong county is a privilege which may be waived, but when properly demanded it divests the court of jurisdiction to proceed. *Ib.*

15. DISQUALIFICATION OF JUDGE.—The fact that the judge of the district court of the proper county is disqualified to try the case is not

a warrant for commencing an action in the wrong county, neither does it authorize the court in which it may be improperly commenced to retain jurisdiction. *Ib.*

16. DISQUALIFICATION OF JUDGE, WHEN CAUSE FOR CHANGE OF VENUE.—The disqualification of a district judge is never a cause for changing the place of trial, except when a competent judge of another district cannot be procured to appear and try the action. *Ib.*

JURORS AND JURY:

1. PRACTICE IN EMINENT DOMAIN PROCEEDINGS.—Under the eminent domain act, the question of necessity for taking the property for municipal purposes is not for the jury to determine,—that being wholly within the province of the municipal authorities. *Warner v. Town of Gunnison*, 430.

2. SAME.—The issues in a condemnation proceeding may be tried either in term time or vacation. When tried to a jury in term time, it must be before the jury drawn in the ordinary way to serve at that term. *Ib.*

3. JUROR—GROUNDS OF CHALLENGE.—The interest of a juror as a member or citizen of a municipality which is a party to the proceeding, does not disqualify him. *Ib.*

4. PRACTICE—JURY FEE.—The failure of the court below to compel the plaintiff to advance the jury fees is not such an error as to warrant a reversal of the judgment. *Com. of Pitkin Co. v. Brown*, 473.

JUSTICE OF THE PEACE:

JUSTICES OF THE PEACE—JURISDICTION.—Under sec. 1 of the act of 1885 (p. 372), which provides that all justices of the peace and police magistrates shall have jurisdiction of cases arising under any ordinances passed pursuant to that act, and that the city council, or a board of trustees, may designate one justice of the peace who shall have jurisdiction exclusively, justices of the peace are not divested of jurisdiction in the absence of an act by the town specially conferring exclusive jurisdiction on some particular justice. *Metcalf v. The People*, 262.

LANDLORD AND TENANT:

1. TRADE FIXTURES—RIGHT OF REMOVAL.—Trade fixtures do not become the property of the landlord, if they are removed during the term, or afterwards with his consent. It is not essential to the application of this rule that the business in which the fixtures were used is distinctively commercial. *Com. of Pitkin Co. v. Brown*, 473.

2. PRACTICE.—A recovery can be had in an action for use and occupation where the defendant holds over after the expiration of his term. *Ib.*

LACHES:

1. LACHES.—A delay of seven years to bring an appropriate action to recover his interest in a mining claim is an equitable bar to an action,

where the plaintiff had failed to contribute labor or money to the enterprise, even if the discovery was made by one with whom he had a contract giving him such interest. *McLaughlin v. Thompson*, 135.

2. SAME.—Reasonable diligence is always necessary to move a court of equity. The strongest equity may be forfeited by laches or abandoned by acquiescence. *Ib.*

LEVY: See EXECUTIONS.

LICENSE.

1. MUNICIPAL DISCRETION.—When a city is vested with power to impose license fees, without express limitation as to the amount thereof, much is left to municipal discretion, and its exercise will not be interfered with by the courts unless it is abused. *Semble*, an injunction should never be issued against a municipal corporation unless the right and power are free from doubt. *Denver City Ry. Co. v. Denver*, 34.

2. MUNICIPAL POWERS—LICENSE, FEES, ETC.—A municipal authority cannot, under its power to license, regulate and tax an occupation or business, tax the property engaged in such business. *Ib.*

LIENS.

1. CONTRACT OF SALE—RESERVATION OF TITLE.—A provision in a contract of sale that the vendor shall retain the title to the chattels sold until payment of the price is, as against creditors of the vendee, void, when he is invested with possession of the thing sold and the indicia of ownership. Such secret liens are constructively fraudulent as against creditors of the purchaser. *Weber v. The Diebold Safe & L. Co.*, 68.

2. SECRET LIENS.—A contract providing for a secret lien may be good as between the parties, but is void as against creditors. *Ib.*

3. JUDGMENT LIEN.—The right to hold as a homestead a parcel of land, the title to which the occupant has acquired under the pre-emption laws, is not impaired by reason of the fact that a transcript of a judgment against him has been filed before he acquired title and designated the land as a homestead. *Woodward v. Peoples Nat. Bank*, 369.

4. SAME.—A mere judgment lien upon land does not prevent the occupant from designating it as a homestead and holding it exempt from an execution issued upon the judgment after such designation. *Ib.*

LIMITATION OF ACTIONS:

RESCISSION OF DEED FOR FRAUD—LIMITATION.—A complaint filed in July, 1887, to rescind a deed made in September, 1883, on the ground of fraud, which does not show when the fraud was discovered, is barred by Gen. Stats., sec. 2174, which provides that "Bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards." *Walker v. Pogue*, 149.

MALICIOUS PROSECUTION:

1. **ACTION FOR MALICIOUS PROSECUTION—WHAT MUST CONCUR.**—The concurrence of malice and want of probable cause is essential to a right of action for a malicious prosecution. *Whitehead v. Jessup*, 78.

2. **MALICE MAY BE INFERRED, WHEN.**—Where there is sufficient evidence of want of probable cause justifying the prosecution of the criminal proceeding, malice may be inferred by the jury. *Ib.*

3. **ADVICE OF COUNSEL, WHEN A DEFENSE.**—That in the prosecution of the criminal cases, the complaining witness acted under the advice of counsel, obtained and used in good faith, after a full and fair statement of all the facts bearing on the guilt or innocence of the accused of which knowledge might have been obtained by the exercise of reasonable diligence, is a defense to an action against him for malicious prosecution. But it is indispensable that the statement to counsel shall have been full and fair. *Ib.*

MANDAMUS:

1. **MANDAMUS.**—Mandamus lies against the military board to compel action upon a matter properly brought before it, but not to control discretion. *Howell v. Cooper*, 530.

2. **TITLE TO OFFICE—MANDAMUS.**—When a person is in actual possession of an office, under election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus. *Henderson v. Glynn*, 303.

3. **SALARY—DE FACTO OFFICER ENTITLED TO.**—One who holds a judicial office under a certificate of election issued by the secretary of state can maintain mandamus against the state auditor to compel the payment of the salary incident to the office, notwithstanding the fact that his election is contested in a pending action. *Ib.*

MASTER AND SERVANT: See **PRINCIPAL AND AGENT.**

MEASURE OF DAMAGES:

1. **MEASURE OF DAMAGES.**—A party having contracted to purchase hay at an agreed price refused to do so. Thereafter the hay was sold for the best price obtainable. *Held*, that the measure of damages for the breach of the contract was the difference between the contract price and that for which the hay was sold. *The Colorado Springs L. S. Co. v. Godding*, 1.

2. **MEASURE OF DAMAGES.**—Plaintiff held a chattel mortgage upon certain cattle, and obtained possession of the cattle by replevin against the mortgagee. He sold the cattle for more than the amount of the claim secured by the mortgage. *Held*, that the defendant might recover in the replevin case the amount received for the cattle in excess of the debt. *Rhoads v. Gatlin*, 96.

MECHANICS' LIENS:

1. **MECHANIC—WHO IS.**—A tailor to whom cloth has been delivered to be made into garments is a mechanic. *Hillsburg v. Harrison*, 298.

2. **MECHANICS' LIEN.**—A mechanic who, under contract, bestows labor upon a chattel for its improvement is entitled to retain the possession thereof until he has been paid for his services, but performance of the contract is essential to the creation of the lien and the existence of the right of enforcement. *Ib.*

3. **MECHANICS' LIEN—PARTIES.**—In an action to foreclose a lien by a material man or subcontractor, the contractor or original promisor, against whom a debt must be established as the foundation of a decree, is an indispensable party. *Davis v. The John Mouat L. Co.*, 381.

4. **ACTION, NATURE OF.**—An action to foreclose a mechanics' lien is not, as to its principal basis, a proceeding *in rem.* *Ib.*

MINES: See **PUBLIC LANDS.**

MISTAKE:

JUDGMENT—CLERICAL MISTAKE.—When a judgment appears to have been entered by a clerical mistake, it will be reversed. *The Atchison T. & S. F. R. R. Co. v. Denver*, 436.

MUNICIPAL CORPORATIONS:

1. **ACTION AGAINST COUNTY—CUMULATIVE REMEDY.**—One whose claim against a county has been presented to and disallowed by the board of county commissioners has the right to elect to appeal from the decision of the board, or bring an independent action. *Com. of Pitkin Co. v. Brown*, 473.

2. **MUNICIPAL AUTHORITY.**—The power of the legislature to confer municipal jurisdiction, save as controlled by constitutional restrictions, is practically unlimited. *Warner v. Town of Gunnison*, 430.

3. **MUNICIPAL DISCRETION.**—When a city is vested with power to impose license fees, without express limitation as to the amount thereof, much is left to municipal discretion, and its exercise will not be interfered with by the courts unless it is abused. *Semble*, an injunction should never be issued against a municipal corporation unless the right and power are free from doubt. *The Denver City Ry. Co. v. Denver*, 34.

4. **EMINENT DOMAIN.**—Cities and towns are authorized to exercise the right of eminent domain by condemning private property for public uses. To supply water for the use of a community is one of the duties imposed on a municipality, and property taken for that purpose is taken for a public use. *Warner v. Town of Gunnison*, 430.

5. **SAME.**—A town or city may, for the purpose of supplying its inhabitants with water, exercise the right of eminent domain by condemning private property without the corporate limits. *Ib.*

6. **EVIDENCE—BURDEN OF PROOF.**—An objection to the introduction of an ordinance in evidence on the ground that the "ayes and nays had not been called upon its passage," must be supported by the proof of such fact, otherwise the objection will not be sustained. *Metcalf v. The People*, 262.

7. **LIABILITY OF COUNTY—WATER COMMISSIONER'S COMPENSATION.**

—Under sec. 2 of an act approved March 25, 1889, (Sess. Laws, 1889, p. 470,) each county into which a water district extends is liable for an equal amount of the compensation of the water commissioner. *Com. of Park Co. v. Locke*, 508.

8. MUNICIPAL POWERS—LICENSE, FEES, ETC.—A municipal authority cannot, under its power to license, regulate and tax an occupation or business, tax the property engaged in such business. *The Denver City Ry. Co. v. Denver*, 34.

9. ORDINANCE—CONSTRUCTION OF.—Under an ordinance providing "no person shall engage in quarreling or fighting, nor shall ask, invite or defy any other person to fight or quarrel;" *held*, that a proprietor of a store had no right to use force to expel from the room one who refused to depart when ordered so to do. *Metcalf v. The People*, 262.

10. SAME.—An ordinance being local, its most authoritative construction should come from local sources, and when more comprehensive than the common law, it cannot be tested by common law rules. *Ib.*

11. POLICE POWER.—A city council cannot under its police power require a ditch to be confined and reconstructed by boxing, fluming or otherwise, for the purpose of preventing the washing and cutting away of property situate along its line and belonging to other parties. *The Platte & Denver C. & M. Co. v. Lee*, 184.

12. SAME—RECITALS NOT CONCLUSIVE.—A recital in an ordinance that "public welfare and safety require" an act to be done is not conclusive upon the judiciary. Courts are not bound by mere forms, nor are they to be misled by mere pretenses. *Ib.*

13. SAME—LIMITATION UPON.—A city council cannot under its police power to promote public health, morals or safety, require the performance of an act which has no real or substantial relation to those objects. *Ib.*

14. PROSECUTION, MAY BE ENJOINED, WHEN.—A city may be enjoined from prosecuting a property owner for violating an ordinance, when such prosecution tends to impair vested rights in the property, or by reason of a multiplicity of suits inflicts irreparable injury without authority of law. *Ib.*

15. PRACTICE—CUMULATIVE REMEDY.—One whose claim against a county has been presented to and disallowed by the board of county commissioners may, under the statute (Gen. Stats., secs. 546 and 547), either appeal to the district court or bring his action at law or in equity. His right to bring an action is not excluded by his statutory right of appeal from the decision of the board. *Com. of Park Co. v. Locke*, 508.

16. CITY WARRANTS—STATUTE AS TO FORM OF, MANDATORY.—Section 22, art. 3, of the charter of the city of Denver (Sess. Laws, 1885, p. 93), providing that every warrant drawn upon the city treasury shall show, among other things, the purpose for which it is issued, *held*, mandatory. *Raymond v. The People*, 329.

17. CITY WARRANTS—WHEN VOID.—The provisions of the statute as

to the form and substance of a city warrant being mandatory, a warrant issued without a compliance with its requirements is void upon its face. *Ib.*

NEGLIGENCE:

1. CONTRIBUTORY NEGLIGENCE.—In such an action the doctrine of contributory negligence cannot be invoked by the defendant. *The Union Pacific Ry. Co. v. Arthur*, 159.

2. CONTRIBUTORY NEGLIGENCE.—The return of an experienced miner to the shaft when an explosion was expected to occur, raises a question of contributory negligence on his part which should have been submitted to the jury. *Davis v. Graham*, 210.

3. SAME.—When a minor, knowing that the means of ascending and descending the shaft in which he is employed are defective and dangerous, continues in the employment after the lapse of a reasonable time for providing safe appliances, he assumes the risk incident to the use of such defective means, notwithstanding he made complaint and was promised that the defect would be remedied promptly. *Ib.*

4. CONTRIBUTORY NEGLIGENCE A QUESTION OF FACT.—Questions of contributory negligence are for the jury, and are to be determined by the facts and circumstances of each case. *City of Denver v. Solomon*, 534.

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—In order to charge a telegraph company, the loss or injury must be the direct and necessary result of its negligence in transmitting the message, but contributory negligence of the plaintiff may prevent a recovery. *The Western Union Tel. Co. v. Cornwell*, 491.

6. NEGLIGENCE.—Owners of ditches are liable in damages resulting from their neglect to carefully maintain and keep the embankments of their ditches in good repair. *Catlin Land & C. Co. v. Best*, 481.

7. NEGLIGENCE PER SE.—The obstruction of a street crossing by railroad engines, in violation of an ordinance, constitutes negligence *per se* on part of the railroad company. *The Denver, Texas & Gulf R. R. Co. v. Robbins*, 313.

8. NEGLIGENCE, WHEN NOT REQUIRED TO BE SHOWN.—It is not necessary in an action under the statute to show negligence on part of the railroad company in causing the fire. *The Union Pacific Ry. Co. v. Arthur*, 159.

9. PROXIMATE CAUSE—A TEST.—In determining what is the proximate cause of an injury one of the most valuable of the *criteria* is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as a cause of the misfortune, the other must be considered as too remote. *The Denver, Texas & Gulf R. R. Co. v. Robbins*, 313.

10. PROXIMATE CAUSE—A QUESTION OF FACT.—Ordinarily the ques-

tion of what was the proximate cause of an injury is one for the jury and not for the court. *Ib.*

NEGLIGENCE, CRIMINAL: See CRIMINAL LAW.

NEW TRIAL:

1. NEW TRIAL—WHEN GRANTED.—When there is no competent evidence upon which a verdict could have been predicated, and where it must have been the result of prejudice, it should be set aside. *Denver etc. R. R. Co. v. De Graff*, 42.

2. VERDICT UPON CONFLICTING EVIDENCE.—The court will not interfere with the verdict when it appears that it was rendered upon conflicting testimony, and it does not appear that the evidence was not fairly considered by the jury. *The Denver, Texas & Fort Worth R. R. Co. v. Richards*, 87.

NONSUIT: See PRACTICE IN CIVIL ACTIONS.

NOTICE:

1. CONSTRUCTIVE NOTICE.—A knowledge of facts sufficient to put a prudent person upon inquiry, is constructive notice of all facts which might have been ascertained by such inquiry or investigation. *Reddin v. Dunn*, 518.

2. PRINCIPAL AND AGENT—NOTICE.—The principal is chargeable with the information acquired by his agent, whether he obtained it in the course of the transaction of his principal's business or otherwise, providing the knowledge is so acquired by him as to be presumptively within his recollection when he is acting on behalf of the principal. *Hummel v. First Nat. Bank*, 571.

OFFICE AND OFFICER:

1. SALARY PAYABLE TO DE FACTO OFFICER.—Payment to a *de facto* officer while he is holding the office and discharging its duties, is a defense to an action brought by the *de jure* officer to recover the same salary. *Henderson v. Glynn*, 303.

2. SALARY—DE FACTO OFFICER ENTITLED TO.—One who holds a judicial office under a certificate of election issued by the secretary of state can maintain mandamus against the state auditor to compel the payment of the salary incident to the office, notwithstanding the fact that his election is contested in a pending action. *Ib.*

ORDINANCES: See also MUNICIPAL CORPORATIONS.

1. ORDINANCE—CONSTRUCTION OF.—Under an ordinance providing "no person shall engage in quarreling or fighting, nor shall ask, invite or defy any other person to fight or quarrel;" held, that a proprietor of a store had no right to use force to expel from the room one who refused to depart when ordered so to do. *Metcalf v. The People*, 262.

2. SAME.—An ordinance being local, its most authoritative construction should come from local sources, and when more comprehensive than the common law, it cannot be tested by common law rules. *Ib.*

3. EVIDENCE—BURDEN OF PROOF.—An objection to the introduction of an ordinance in evidence on the ground that the “ayes and nays had not been called upon its passage,” must be supported by proof of such fact, otherwise the objection will not be sustained. *Ib.*

PARTNERS AND PARTNERSHIP:

1. PARTNER, AUTHORITY OF.—A member of a non-trading firm cannot, without express authority, bind his copartner by the execution of a note unless it is necessary to the transaction of the partnership business, or there be a custom in that class of business from which the law implies such authority. *Tanner v. Hyde*, 443.

2. MINING PARTNERS, LIABILITY OF.—A mining partnership having existed between the parties, they are legally bound for the debts legitimately contracted by the concern during the time the partnership existed. *Perkins v. Peterson*, 242.

PARTIES:

1. MECHANICS' LIEN—PARTIES.—In an action to foreclose a lien by a material man or subcontractor, the contractor or original promisor, against whom a debt must be established as the foundation of a decree, is an indispensable party. *Davis v. The John Mouat L. Co.*, 381.

2. PRACTICE—PARTIES.—An action on an undertaking in attachment may be maintained against principal and sureties jointly, without first obtaining judgment against the principal. *Mattler v. Brind*, 439.

PATENT: See PUBLIC LAND.

PAYMENT:

DRAFT, WHEN NOT PAYMENT.—The defendant sent a draft to plaintiff, as a payment on account. It was not paid, and plaintiff was guilty of no laches in his efforts to collect, but returned it within a reasonable time: *Held*, that defendant was not entitled to credit for its amount. *Edwards v. Harvey*, 109.

PLEADINGS:

1. ALLEGATIONS.—The allegations in a pleading must be positive and not by way of recital, and must be of facts only and not of law. *Robinson v. Dolores Land & C. Co.*, 17.

2. AMENDMENT.—A complaint which fails to allege the time when the note sued upon is payable may be amended, and unless such amendment is prejudicial to or prevents defendant from interposing a proper defense, a continuance of the cause for the purpose of allowing defendant to amend its answer will not be granted. *The Tribune Pub. Co. v. Hamill*, 237.

3. SAME.—Courts are liberal in allowing amendments when the cause of action is not changed, and where the complaint fails to state when the note sued on is payable, but the note is overdue, and the maker knows it to be the note he will be called upon to defend against, an

amendment whereby the time of payment is inserted does not change the character of the action. *Ib.*

4. AMENDMENT AFTER APPEAL.—A court has power to vacate a judgment at the term at which it was rendered, and permit the pleadings in the case to be amended, notwithstanding an appeal from the judgment has been perfected. *Higgins v. The People*, 567.

5. SAME—DISCRETION.—The allowance of amendments to pleadings rests in the sound discretion of the court. *Ib.*

6. BURDEN OF PROOF.—When the allegations of the complaint in an action for damages for a breach of covenant of seizin are denied, the burden of proof is upon the plaintiff. *Landt v. Major*, 551.

7. CANCELLATION OF DEEDS, WHEN NOT DECREED.—The complaint showed that the state had held the fee to a portion of a certain "school section," that it had been leased to D. who transferred the leasehold interest to B., by whom valuable improvements were made upon the premises. That defendant T. applied to the land board to purchase the premises, and, in his application, made many false representations as to the value of the improvements, the condition of the premises and their abandonment. That, without an appraisement of the improvements, the land was patented to him, he paying to the board for the benefit of the owner of the improvements (in addition to the purchase price) \$150, the amount he represented their value to be. The relief demanded was the cancellation of the patent to T. and various mesne conveyances by him and his grantees;—to the end, apparently, that the board and T. might be compelled to protect B. in his improvements and secure the payment of their value: *Held*, that no cause of action was stated in favor of the people. *People v. Tynon*, 131.

8. FRAUD.—Fraud is a conclusion of law from the facts stated. It is not sufficient in a pleading to make a charge of fraud in general terms. The particular fraudulent acts should be pointed out and stated. *Robinson v. Dolores Land & C. Co.*, 17.

9. RESCISSION OF DEED FOR FRAUD—LIMITATION.—A complaint filed in July, 1887, to rescind a deed made in September, 1883, on the ground of fraud, which does not show when the fraud was discovered, is barred by Gen. Stats., sec. 2174, which provides that "Bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards." *Walker v. Pogue*, 149.

10. PLEADING—NEGLIGENCE.—Negligence is sufficiently charged in a complaint which states that the defendant railroad company was unlawfully and negligently occupying a street crossing with its engines in violation of a city ordinance, and that by reason of that fact, and without negligence on part of the plaintiff, the injury complained of resulted. *Denver, etc., R. R. Co. v. Robbins*, 313.

11. NEGLIGENCE—WHEN NOT REQUIRED TO BE SHOWN.—As to the contention that no recovery could be had in this action without proof

of negligence, *held*, that the necessity of such proof is obviated by the statute. *U. P. R. R. Co. v. DeBusk*, 12 Colo. 296, so construing the act and declaring it to be constitutional, followed. *Denver, etc., R. R. Co. v. De Graff*, 42.

12. PLEADING.—A complaint to rescind a conveyance on the ground that the stock of goods taken in consideration therefor was not as represented, which shows that the goods were delivered to the plaintiff as agreed, but fails to state when the fraud was discovered, or that the goods were returned or tendered to the defendant, is bad on general demurrer. *Walker v. Pogue*, 149.

13. PLEADING—FACTS, NOT CONCLUSIONS, SHOULD BE STATED.—The conclusions of the pleader stated as facts, broad, general assertions, sweeping and comprehensive accusations of conspiracy, fraud, mismanagement and incompetency, cannot be made to supply the want of a specific statement of facts. *Robinson v. Dolores Land & C. Co.*, 17.

14. PRACTICE.—No relief ought to be granted on a case other than the one laid by the pleadings. *First Nat. Bank v. Campbell*, 271.

15. PRACTICE—REPLICATION.—A replication is not necessary to an answer which puts in issue the ownership of the note sued upon, and contains new matter which is not defensive. *Woolman v. The Capital Nat. Bank*, 454.

16. PLEADING—UNDER STATUTE.—A complaint containing a statement of facts constituting a cause of action under the statute is sufficient. No reference to the statute under which the action is brought is necessary. *The Denver, etc., R. R. Co. v. De Graff*, 42.

PLEADINGS AND PROOFS:

1. ALLEGATION AND PROOF.—In an action for damages against the owner of premises for injuries sustained by reason of a nuisance thereon, the allegation of ownership is sustained by proof of a tangible and defined interest united with the control of the property, notwithstanding the legal title may be in a trustee. *City of Denver v. Soloman*, 534.

2. PLEADINGS AND PROOF.—The allegations and proof must correspond. *Brewster v. Crossland*, 446.

3. PRACTICE.—A fact admitted by the pleadings need not be proved. *City of Denver v. Soloman*, 534.

POLICE POWER:

1. POLICE POWER.—A city council cannot under its police power require such a ditch to be confined and reconstructed by boxing, fluming or otherwise, for the purpose of preventing the washing and cutting away of property situate along its line and belonging to other parties. *Platte and Denver C. & M. Co. v. Lee*, 184.

2. SAME—LIMITATION UPON.—A city council cannot under its police power to promote public health, morals or safety, require the performance of an act which has no real or substantial relation to those objects. *Ib.*

3. **SAME—RECITALS NOT CONCLUSIVE.**—A recital in an ordinance that “public welfare and safety require” an act to be done is not conclusive upon the judiciary. Courts are not bound by mere forms, nor are they to be misled by mere pretenses. *Ib.*

PRACTICE IN COURT OF APPEALS: See **APPELLATE COURT.**

PRACTICE IN CIVIL ACTIONS:

1. **ACTION TO QUIET TITLE.**—The Civil Code, sec. 255, which provides for action by one in possession of land by himself or tenant “against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim,” does not authorize an action by one who has conveyed the legal title to the land, but retains possession thereof. *Walker v. Pogue*, 149.

2. **PLEADING—AMENDMENT.**—A complaint which fails to allege the time when the note sued upon is payable may be amended, and unless such amendment is prejudicial to or prevents defendant from interposing a proper defense, a continuance of the cause for the purpose of allowing defendant to amend its answer will not be granted. *The Tribune Pub. Co. v. Hamill*, 237.

3. **SAME.**—Courts are liberal in allowing amendments when the cause of action is not changed, and where the complaint fails to state when the note sued on is payable, but the note is overdue, and the maker knows it to be the note he will be called upon to defend against, an amendment whereby the time of payment is inserted does not change the character of the action. *Ib.*

4. **APPEARANCE.**—Defendant is not required to appear and answer the complaint in obedience to a second summons while his motion to quash the first is pending. *Farris v. Walter*, 450.

5. **ACTION AGAINST COUNTY—CUMULATIVE REMEDY.**—One whose claim against a county has been presented to and disallowed by the board of county commissioners, has the right to elect to appeal from the decision of the board, or bring an independent action. *Com. of Pitkin Co. v. Brown*, 473.

6. **COLLATERAL ATTACK.**—The sufficiency of the affidavit cannot be attacked collaterally by a third party. *Leppel v. Beck*, 390.

7. **PRACTICE—TIME OF FILING DEMURRER.**—A demurrer to an answer cannot be filed after expiration of the time prescribed by statute, and after a motion by defendant for judgment on the pleadings, without leave of court. The court was not bound to consider a demurrer so filed. *Rhoads v. Gatlin*, 96.

8. **PRACTICE—DISCRETION.**—The conduct of the trial and control of counsel is so fully within the discretion of the trial court, that its action in this respect will not be reviewed, unless it is manifest that discretion has been plainly and grossly abused. *Felt v. Cleghorn*, 4.

9. **SAME POINT.** *Hill v. Colorado Nat. Bank*, 325.

10. **PRACTICE IN DIVORCE CASES.**—It is of no consequence how the

court obtains the requisite legal knowledge of the fact of plaintiff's adultery. It may crop out of the proofs without having been pleaded, but must be acted upon by the court. If it shall appear, no divorce can be decreed. *Redington v. Redington*, 8.

11. EVIDENCE OF FACTS, NOT ADMISSIBLE WITHOUT PLEADING.—Evidence of facts not pleaded is not admissible, and if admitted will not support a decree. *McLaughlin v. Thompson*, 135.

12. FINDINGS OF FACT MUST BE UPON EVIDENCE.—The convictions of the judge based upon personal observations cannot take the place of competent evidence. *The Denver City Ry. Co. v. City of Denver*, 34.

13. TITLE TO OFFICE—MANDAMUS.—When a person is in actual possession of an office, under election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus. *Henderson v. Glynn*, 303.

14. MECHANICS' LIEN—PARTIES.—In an action to foreclose a lien by a material man or subcontractor, the contractor or original promisor, against whom a debt must be established as the foundation of a decree, is an indispensable party. *Davis v. The John Mouat L. Co.*, 381.

15. NATIONAL BANK—PRACTICE.—A national bank organized to do business in this state is not a foreign corporation within the rule which requires proof of corporate existence under a general denial. *Hummel v. First Nat. Bank*, 571.

16. NEW TRIAL—WHEN GRANTED—Where there is no competent evidence upon which a verdict could have been predicated, and where it must have been the result of prejudice, it should be set aside. *The Denver, Texas & Gulf R. R. Co. v. De Graff*, 42.

17. NONSUIT—WHEN JUSTIFIED.—In order to justify the court in withdrawing a case for damages from the jury, the facts should not only be undisputed, but the conclusions to be drawn from those facts indisputable. *City of Denver v. Soloman*, 534.

18. SAME.—It is only where the circumstances in an action for damages are such that the standard of duty is fixed and the measure of duty defined by law and is the same under all circumstances, that the court can withdraw it from the jury. *Ib.*

19. NONSUIT.—It is not error to refuse a nonsuit when there is evidence of damage for which a recovery could be legally had. *The Catlin Land & C. Co. v. Best*, 481.

20. PRACTICE.—A fact admitted by the pleadings need not be proved. *City of Denver v. Soloman*, 534.

21. SAME.—An objection on the ground of nonjoinder of a party cannot be raised for the first time in this court. *Ib.*

22. SAME.—A party cannot assign as error an instruction given at his request. *Ib.*

23. PRACTICE.—Questions as to misjoinder of parties defendant, not saved by the record, will not be considered on appeal. *The Owl Canon Gypsum Co. v. Ferguson*, 219.

24. PRACTICE.—A failure to serve the defendant in attachment with a copy of the writ can be taken advantage of only by the defendant not served. *Elliott v. First Nat. Bank*, 164.

25. OBJECTIONS—WAIVED.—Failing to take advantage of material defect, and by pleading to the merits, the defendant will be presumed to have waived his objection. *Morris v. Hanson*, 154.

26. PRACTICE.—When a party's objection to the introduction of testimony was sustained, he will not be heard to complain that it was not introduced. *Warner v. Town of Gunnison*, 430.

27. PRACTICE.—In cases where the testimony was taken before a referee and by him certified to the trial court, the appellate court will, upon review, examine the evidence and determine for itself the correctness of the findings of fact. *Childs v. Lowenbruck*, 92.

28. PRACTICE.—Where the judge of the court was *ex officio* clerk, there was no occasion for an order of court to the clerk to make an assessment of the several amounts each attaching creditor was entitled to out of the property attached. The assessment having been made by the judge in his capacity as clerk it was sufficient. *Rawles v. The People*, 501.

29. PRACTICE.—A recovery can be had in an action for use and occupation where the defendant holds over after the expiration of his term. *Com. of Pitkin Co. v. Brown*, 473.

30. PRACTICE.—One White recovered judgment in justice court against Madeley & Brophy for \$297 and costs. Madeley & Brophy appealed to the county court, and while the appeal was pending sent C. to compromise and adjust the matter, giving him \$135 for that purpose. C., as he and his principals supposed, succeeded in effecting a compromise. At the time of the supposed adjustment White executed and delivered a receipt for \$175, reciting that it was in full payment and settlement of the case pending on appeal.

The receipt was not filed in the county court, but the appeal was dismissed. The justice to whom the case was remanded issued an execution on the judgment for the entire amount, and the constable proceeded to make a levy.

Madeley & Brophy brought this action to obtain an injunction against White, and the justice, and constable, to restrain them from further proceedings under the judgment and execution. At this time White repudiated the receipt, admitted its delivery, but claimed that he had received only a note for \$40, and \$50 cash. *Held—*

That as the receipt was not in full of the amount of judgment except by agreement of the parties, when challenged, it could not be held a discharge.

The transactions between Madeley & Brophy and their agent C. could not affect White.

The receipt not having been filed in county court, and the judgment satisfied, it was, in the district court, open to explanation.

The appeal having been dismissed without action upon the receipt, neither the county court nor justice could recognize or act upon it. *Madeley v. White*, 408.

31. INSTRUCTIONS. — Objections to instructions should be made in such time and manner as to give the trial court an opportunity to correct the same, if found erroneous. General exceptions to instructions "in each and every part thereof" are insufficient. *Jacobs v. Mitchell*, 456.

32. SAME.—Oral instructions are within the above rule. *Ib.*

33. INSTRUCTIONS MUST BE IN WRITING.—It is error to instruct a jury orally. *Brown v. Crawford*, 235.

34. SAME, ERROR NOT CURED, WHEN.—At the trial objection was made to instructing the jury orally. The court, however, gave oral instructions, but directed the stenographer to note and extend those given. After argument the instructions were extended and signed by the judge. *Held*, that the error was not thereby cured. *Ib.*

35. INSTRUCTIONS.—It is not error to refuse to submit to the jury a question upon which there is no evidence. *Westman Mercantile Co. v. Park*, 545.

36. PERSONAL JUDGMENT—JURISDICTION.—A personal judgment in an action upon a money demand against a nonresident, on whom personal service of process within the state has not been had and who did not appear, is without validity. *Davis v. The John Mouat L. Co.*, 381.

37. JURY FEE.—The failure of the court below to compel the plaintiff to advance the jury fees is not such an error as to warrant a reversal of the judgment. *Com. of Pitkin Co. v. Brown*, 473.

38. PARTIES.—An action on an undertaking in attachment may be maintained against principal and sureties jointly, without first obtaining judgment against the principal. *Mattler v. Brind*, 439.

39. REPLICATION.—A replication is not necessary to an answer which puts in issue the ownership of the note sued upon, and contains new matter which is not defensive. *Woolman v. Capital Nat. Bank*, 454.

40. REPLEVIN—INSUFFICIENT OR INFORMAL UNDERTAKING.—The acceptance of an informal or insufficient undertaking, in an action of replevin, must be taken advantage of at the earliest practicable opportunity, as such defective undertaking will not deprive the court of jurisdiction, nor in any way interfere with or void the proceeding. *Morris v. Hanson*, 154.

41. REPLEVIN—WHEN IT LIES.—Coats made by defendant of cloth furnished by plaintiff for that purpose cannot be replevied before completion of the garments, where the evidence fails to show that the defendant violated his contract, or that plaintiff paid or tendered defendant's wages. *Hillsburg v. Harrison*, 298.

42. SET-OFF.—Demands to be set off must be mutual between the parties to the action. *Woolman v. Capital Nat. Bank*, 454.

43. SUMMONS.—When summons was not issued within thirty days after

complaint was filed, the suit was properly dismissed on special appearance of defendant for the purpose of such motion, and the motion was not addressed to the discretion of the court. *Steves v. Carson*, 200.

44. **SUMMONS, PUBLICATION OF.**—It is necessary that every material requirement of the statute concerning service of summons by publication be carefully and strictly pursued in order to give the court jurisdiction. *Davis v. The John Mouat L. Co.*, 381.

45. **SETTLEMENT—DUE BILL — PROOF.**—Where, in seeking to defeat recovery of the amount of a due bill given in a settlement, defendants failed to state or plead that what they proposed to prove was not known and fully understood by them at the time of settlement and delivery of the bill, such proof is properly rejected. *Buno v. Gabriel*, 295.

PRACTICE IN CRIMINAL CASES:

1. **PRACTICE IN CRIMINAL CASES.**—An objection that the offenses charged in the indictment are improperly joined will not be considered, upon error, when it appears that before the trial a *nolle prosequi* had been entered as to the count claimed to have been improperly joined, and that no evidence was admitted under it at the trial, or reference made to it by the court. *Heller v. The People*, 459.

2. **INDICTMENT, WHEN SUFFICIENT.**—An indictment stating the fact constituting the crime of embezzlement, but not designating the accused as bailee, trustee or agent, is sufficient. *Ib.*

3. **SAME.**—It is not necessary in an indictment for embezzlement of a promissory note to describe the note with particularity. *Ib.*

4. **LIST OF JURORS.**—The statute, providing that previous to arraignment of a defendant for a felony he shall be furnished with a copy of the indictment and a list of the jurors and witnesses, does not require that such be furnished at any subsequent time. *Ib.*

5. A defendant who has gone to trial without objection cannot, by motion in arrest of judgment, obtain his discharge on the ground that he was not tried on or before the second term of court after he was committed. *Ib.*

PRESUMPTIONS:

1. **CUSTOM.**—If there was a custom among merchant tailors and their employees requiring the latter to return garments for inspection before receiving compensation for their labor, the presumption obtains that the contract of employment was entered into with reference to it. Such a custom is reasonable and in no wise interferes with the lien of the mechanics. *Hillsburg v. Harrison*, 298.

2. **PRESUMPTION ON REVIEW.**—In the absence of a bill of exceptions containing the evidence, the presumption is that the judgment was warranted by the proofs. *Sioux City Nursery Co. v. Carlton*, 157.

PRINCIPAL AND AGENT:

1. **AGENCY.**—The relation of banker and correspondent for the pur-

pose of collection is that of special agent to do a particular thing. *Hummel v. First Nat. Bank*, 571.

2. AGENT—WHAT POWERS NOT PRESUMED.—The general manager of a mining and milling company has no power, by virtue of his office, to bind the company by contracts for the purchase of machinery. *The Victoria Gold M. Co. v. Fraser*, 14.

3. AGENCY—EVIDENCE OF AUTHORITY.—To bind the principal to execute a conveyance of real estate, the authority of the agent to make the sale must be established. Such authority need not be under seal—need not be contained in a single instrument—may be deduced from letters and telegrams, but it is indispensable that the agency and authority be established. *Sullivan v. Leer*, 141.

4. GENERAL AGENT—WHO IS—EVIDENCE OF.—A person authorized to accept risks, to agree upon and settle the terms of insurance and to carry them into effect by issuing and renewing policies, is regarded as a general agent of the company pending negotiations.

The possession of blank policies and renewal receipts signed by the president and secretary of the company is evidence of such agency. *Farmers & Merchants Ins. Co. v. Nixon*, 265.

5. In the absence of limitation upon the power and discretion which the agent may exercise in regard to location, price, terms or time of payment in the purchase of real estate, the principal will be bound by the contract of the agent, and cannot recover any part of the purchase money paid upon the contract. *Boulder Investment Co. v. Fries*, 373.

6. PRINCIPAL AND AGENT—NOTICE.—The principal is chargeable with the information acquired by his agent, whether he obtained it in the course of the transaction of his principal's business or otherwise, providing the knowledge is so acquired by him as to be presumptively within his recollection when he is acting on behalf of the principal. *Hummel v. First Nat. Bank*, 571.

7. POWER.—A general agent can waive any condition inserted in the provisions of a policy of insurance. *Farmers & Merchants Ins. Co. v. Nixon*, 265.

8. PRINCIPAL'S LIABILITY.—B., the owner of a store, turned the business over to G., who was to run it in the interest of B. at a definite wage, which was to be determined by the success or failure of the enterprise, conducted under a new name. *Held*, that the business remained B.'s, who was liable for debts incurred in the purchase of goods, unless he relieved himself by definite notice to the persons with whom the store commonly dealt, or such information was brought home to the vendors of goods in such a way as to render it inequitable to hold B. therefor. *Bice v. Hover*, 172.

9. RATIFICATION.—The principal may, by ratification of the unauthorized act made in its behalf, make its own and become liable thereon. *The Victoria Gold M. Co. v. Fraser*, 14.

PROBABLE CAUSE: See **MALICIOUS PROSECUTION.**

PROMISSORY NOTES: See also **COMMERCIAL PAPER.**

DEFENSE—FAILURE OF CONSIDERATION.—The defendant in an action on a promissory note may always, while the note remains the property of the payee, avail himself of the defense that it was given without consideration. *The Sioux City Nursery Co. v. Carleton*, 157.

PROXIMATE CAUSE:

1. **PROXIMATE CAUSE—A TEST.**—In determining what is the proximate cause of an injury, one of the most valuable of the *criteria* is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as a cause of the misfortune, the other must be considered as too remote. *The Denver, Texas & Gulf R. R. Co. v. Robbins*, 313.

2. **PROXIMATE CAUSE—A QUESTION OF FACT.**—Ordinarily the question of what was the proximate cause of an injury is one for the jury and not for the court. *Ib.*

PUBLIC LAND:

1. **ALIENS CANNOT LOCATE MINING CLAIMS.**—None but citizens of the United States and those who have declared their intention to become such can acquire any right to public mineral lands by location. *Lee v. The Justice Mining Co.*, 112.

2. **ASSIGNMENT OF LOCATION BY ALIEN, EFFECT OF.**—An alien cannot by assignment or conveyance to a citizen transfer any better or greater right than he himself possesses. *Ib.*

3. **HOLDER OF LEGAL TITLE, WHEN TRUSTEE.**—If for any reason recognized by courts of equity as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience and by law, it ought to go to another, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title. *Ib.*

4. **SAME.**—When a location has been attempted to be made by an alien and his assignee has obtained a receiver's receipt based thereon, one who has made a valid location upon the premises prior to the issuance of the receiver's receipt may invoke the principle above stated for the purpose of acquiring the legal title. *Ib.*

5. **OCCUPANTS—TOWN SITES.**—The defendant's occupancy of a lot in a town, the site of which had been entered by the county judge under the provisions of sec. 2387, U. S. R. S., having been prior to that of the plaintiff or his grantor, and it not appearing that he had abandoned his claim, *held*, that, as between the parties, his was the better right. *Webber v. Petty*, 63.

RAILROADS:

1. **STATUTORY ACTION.**—A party injured by fire set out or caused by

the operating of a line of railroad has an action for his damages, and is not required to avail himself of the provision of March 31, 1887. *The Denver, Texas & Gulf R. R. Co. v. DeGraff*, 42.

2. STATUTORY CONSTRUCTION.—The object of the amendment of the statute (Sess. Laws 1887, p. 368) was to facilitate adjustment of losses and *prima facie* establish the amount of damages sustained by reason of the fire. *Ib.*

RATIFICATION:

RATIFICATION.—The principal may, by ratification of the unauthorized act made in its behalf, make it its own and become liable thereon. *The Victoria Gold M. Co. v. Fraser*, 14.

REAL ESTATE BROKERS: See PRINCIPAL AND AGENT.

RECEIPT:

PRACTICE, ETC.—One White recovered judgment in justice court against Madeley & Brophy for \$297 and costs. Madeley & Brophy appealed to the county court, and while the appeal was pending sent C. to compromise and adjust the matter, giving him \$135 for that purpose. C., as he and his principals supposed, succeeded in effecting a compromise. At the time of the supposed adjustment White executed and delivered a receipt for \$175, reciting that it was in full payment and settlement of the case pending on appeal.

The receipt was not filed in the county court, but the appeal was dismissed. The justice to whom the case was remanded issued an execution on the judgment for the entire amount, and the constable proceeded to make a levy.

Madeley & Brophy brought this action to obtain an injunction against White, and the justice, and constable, to restrain them from further proceedings under the judgment and execution. At this time White repudiated the receipt, admitted its delivery, but claimed that he had received only a note for \$40, and \$50 cash. *Held—*

That as the receipt was not in full of the amount of judgment except by agreement of the parties, when challenged, it could not be held a discharge.

The transactions between Madeley & Brophy and their agent C. could not affect White.

The receipt not having been filed in county court, and the judgment satisfied, it was, in the district court, open to explanation.

The appeal having been dismissed without action upon the receipt, neither the county court nor justice could recognize or act upon it. *Madeley v. White*, 408.

RECOUPMENT:

RECOUPMENT.—A contract providing for the delivery of 1,500,000 feet of lumber to be delivered in lots, monthly, and to be paid for as received, is severable, and failure to deliver all the lumber specified in the

contract will not preclude a recovery for the amount actually delivered, but any damage resulting from such failure or occasioned by the breach may be set off or recouped. *Gomer v. McPhee*, 287.

REDEMPTION:

REDEMPTION—VOID SALE.—A judgment creditor who has paid money to the sheriff for the purpose of redeeming property from a sale may, upon ascertaining that the sale was void, recover the money so paid, in an action against the sheriff commenced while the fund was still in his hands. *Brown v. Hunter*, 527.

REPLEVIN:

1. **REPLEVIN—INSUFFICIENT OR INFORMAL UNDERTAKING.**—The acceptance of an informal or insufficient undertaking, in an action of replevin, must be taken advantage of at the earliest practicable opportunity, as such defective undertaking will not deprive the court of jurisdiction nor in any way interfere with or void the proceeding. *Morris v. Hanson*, 154.

2. **OBJECTIONS, WAIVED.**—Failing to take advantage of such defect, and by pleading to the merits, the defendant will be presumed to have waived his objection. *Ib.*

3. **REPLEVIN—WHEN IT DOES NOT LIE.**—Coats made by defendant of cloth furnished by plaintiff for that purpose cannot be replevied before completion of the garments, where the evidence fails to show that the defendant violated his contract, or that plaintiff paid or tendered defendant's wages. *Hillsburg v. Harrison*, 298.

RESCISSION:

1. **RESCISSION OF DEED FOR FRAUD.**—A complaint filed in July, 1887, to rescind a deed made in September, 1883, on the ground of fraud, which does not show when the fraud was discovered, is barred by Gen. Stats., sec. 2174, which provides that "Bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards." *Walker v. Pogue*, 149.

2. **UNDUE INFLUENCE—EQUITY.**—Where a transaction is the result of moral, social or domestic force exerted upon a party, controlling free action of his will and preventing any true consent, equity may relieve against it on the ground of undue influence. *Lighthall v. Moore*, 554.

3. **SAME.**—It is a constant rule in equity that where a party is not a free agent and is not equal to protecting himself, the court will protect him. *Ib.*

4. **SAME.**—A party in another's power may have canceled an inequitable bargain to which he was entrapped or practically compelled, though there may have been neither technical fraud nor technical duress. *Ib.*

REVENUE: See **TAXATION**.

SALES: See also VENDOR AND PURCHASER.

1. **SALE OF CHATTELS.**—No sale of chattels can be maintained as against an execution creditor, unless there be an immediate delivery and change of possession of the articles sold, and such possession must be open, notorious and unequivocal. *Felt v. Cleghorn*, 4.

2. **SALE OF CHATTELS WITHOUT CHANGE OF POSSESSION, VOID.**—The intervenor was a purchaser of the goods attached, but the sale was not followed by an open, notorious and unequivocal change of possession; *held*, that as against the creditor of the vendor the title of the intervenor could not be sustained. *Goard v. Gunn*, 66.

3. **CONDITIONAL SALE.**—In this state there can be as against third persons no sale of personal property with a valid reservation of the title or lien for the benefit of the vendor, nevertheless such conditions in the sale of property in a state where they are allowable will, upon the removal of the property into this state, be upheld. *Harper v. The People, etc.*, 177.

4. **CONTRACT OF SALE—RESERVATION OF TITLE.**—A provision in a contract of sale that the vendor shall retain the title to the chattels sold until payment of the price is, as against creditors of the vendee, void, when he is invested with possession of the thing sold and the indicia of ownership. Such secret liens are constructively fraudulent as against creditors of the purchaser. *Weber v. Diebold, etc. Co.*, 68.

5. **SECRET LIENS.**—A contract providing for a secret lien may be good as between the parties, but is void as against creditors. *Ib.*

6. **SALE—CONSIGNMENT.**—D., having bought a quantity of soap of the plaintiff, was induced to take on consignment one hundred and fifty additional cases, to be accounted for at the rate of \$3.25 per case, if he succeeded in selling it, and he agreed that plaintiff might draw for the amount of the soap account at ninety days,—the draft to be accepted for plaintiff's accommodation, but at maturity should be paid only to the extent of sales by D. from the one hundred and fifty cases. None of the soap consigned to D. was sold by him, and the draft was returned unpaid. The one hundred and fifty cases of soap were never commingled with D.'s general stock. *Held*, that the title to the soap remained in the plaintiff as against attaching creditors of D. *Soap Co. v. Burns*, 89.

8. **WAREHOUSE RECEIPTS.**—Goods or property in store may be transferred by assignment and delivery of the warehouse receipt. *Hill v. Colo. Nat. Bank*, 324.

9. The assignment and delivery of a warehouse receipt for goods in store is a constructive delivery of the goods which takes the place of the actual delivery required at common law. *Ib.*

SET-OFF:

1. **CONTRACT—RECOUPMENT.**—A contract providing for the delivery of 1,500,000 feet of lumber to be delivered in lots, monthly, and to be

paid for as received, is severable, and failure to deliver all the lumber specified in the contract will not preclude a recovery for the amount actually delivered, but any damage resulting from such failure or occasioned by the breach may be set off or recouped. *Gomer v. McPhee*, 287.

2. SET-OFF.—Demands to be set off must be mutual between the parties to the action. *Woolman v. Capital Nat. Bank*, 454.

SCHOOL LAND:

APPRAISEMENT IS NOT A CONDITION PRECEDENT TO RIGHT TO SELL.—An appraisement of the improvements of a lessee upon school land, and a deposit of a receipt of the lessee showing payment by the purchaser of the value of the improvements, is not a condition precedent to the power of the land board to complete the sale. Such provisions are for the benefit of the lessee, and do not constitute limitations upon the power of the board. *The People v. Tynon*, 131.

SPECIFIC PERFORMANCE:

1. SPECIFIC PERFORMANCE, WHEN DECREED.—Specific performance of a contract to convey real estate will be decreed only when the contract is clear and is established beyond question, and even then it rests largely in the discretion of the court. *Sullivan v. Leer*, 141.

2. ADEQUACY OF REMEDY AT LAW.—A court of chancery has jurisdiction to decree the performance of a contract to convey real estate, regardless of the adequacy of an action at law. *Ib.*

3. SPECIFIC PERFORMANCE.—A contract to be specifically enforced must be definite and certain and upon a valuable consideration. *Winter v. Goebner*, 259.

4. CONSIDERATION—SEAL.—A promise against a promise is not, in this class of cases, a good consideration, nor does a seal import a consideration. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION:

1. ACTION.—A party injured by fire set out or caused by the operating of a line of railroad has an action for his damages, and is not required to avail himself of the provision of the act of March 31, 1887. *Denver T. & G. R. R. Co. v. De Graff*, 42.

2. The object of the amendment of the statute, Sess. Laws 1887, p. 368, was to facilitate adjustment of losses and *prima facie* establish the amount of damages sustained by reason of the fire. *Ib.*

3. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—A deed of assignment for the benefit of creditors, to be valid, must show upon its face that it was intended to embrace all of the property of the assignor. *Palmer v. McCarthy*, 422.

4. SAME.—A failure to comply with the requirement of the statute with respect to a list of the creditors and an inventory of the estate under oath, will invalidate the deed of assignment. *Ib.*

5. CITY WARRANTS—STATUTE AS TO FORM OF, MANDATORY.—Sec-

tion 22, art. 3, of the charter of the city of Denver (Sess. Laws, 1885, p. 93), providing that every warrant drawn upon the city treasury shall show, among other things, the purpose for which it is issued, *held*, mandatory. *Raymond v. The People*, 329.

6. CITY WARRANTS—WHEN VOID.—The provisions of the statute as to the form and substance of a city warrant being mandatory, a warrant issued without a compliance with its requirements is void upon its face. *Ib.*

7. CONSTITUTIONAL LAW.—Section 3712, Mills' An. Stats., fixing upon railroad companies an absolute liability for damages for all stock injured or killed, and sec. 3713, which provides for a recovery of double the appraised value of the animals injured or killed, with a reasonable attorney's fee in case of failure to pay the appraised value within the time prescribed, are unconstitutional and void. *Denver & R. G. Ry. Co. v. Outcalt*, 395.

8. PRACTICE IN CRIMINAL CASES.—A defendant who has gone to trial without objection, cannot by motion in arrest of judgment obtain his discharge on the ground that he was not tried on or before the second term of court after he was committed. *Heller v. The People*, 459.

9. PRACTICE IN CRIMINAL CASES—LIST OF JURORS.—The statute providing that previous to arraignment of a defendant for a felony he shall be furnished with a copy of the indictment and a list of the jurors and witnesses, does not require that such be furnished at any subsequent time. *Ib.*

10. STATUTORY CONSTRUCTION.—Statutes tending to effect an object of great public utility, ought to receive the most liberal and benign interpretation. *Warner v. Town of Gunnison*, 431.

11. STATUTORY CONSTRUCTION—REPEALS.—General statutes do not repeal special statutes by implication. *Rice v. Goodwin*, 267.

12. CONSTRUCTION.—A statute may be declared unconstitutional in part and valid in part, but this can occur only when its provisions can be separated and made independent. When its provisions are interdependent, the entire statute must stand or fall. *Denver & R. G. Ry. Co. v. Outcalt*, 395.

13. TOWN SITE PATENT—CONVEYANCE.—When a patent to a town site has been issued to the county judge and his successors, a deed by a commissioner appointed by the municipal authorities passes no title. *Rice v. Goodwin*, 267.

14. TOWN SITE—RIGHT OF FIRST OCCUPANT.—It is provided by sec. 15 of the "Town Site Act" (Gen. Stats., sec. 3284), that the person who shall have first acquired the right to the possession or occupancy of the lands in person, by agent, servant or tenant, or those claiming under him, shall be deemed to have the prior and paramount right. *Ib.*

15. In proceedings under a special statute, any serious departure from its provisions will vitiate them. *Ib.*

16. The "Town Site Act" is a special statute, and its provisions relating to practice are not repealed by implication by the civil code, which is general. *Ib.*

STATUTE OF FRAUDS:

1. SALE OF CHATTELS WITHOUT CHANGE OF POSSESSION, VOID.—The intervenor was a purchaser of the goods attached, but the sale was not followed by an open, notorious and unequivocal change of possession; *held*, that as against the creditor of the vendor, the title of the intervenor could not be sustained. *Goard v. Gunn*, 66.

2. SALE OF CHATTELS—STATUTE OF FRAUDS.—No sale of chattels can be maintained as against an execution creditor, unless there be an immediate delivery and change of possession of the articles sold, and such possession must be open, notorious and unequivocal. *Felt v. Cleg-horn*, 4.

3. STATUTE OF FRAUDS.—Mrs. B., who on account of the illness of her husband was attending to his business, wrote to his creditor the following letter:—"Mr. Hoffer. You will find enclosed fifty dollars, all I can raise at present, I hope to be able to give you more very soon. Please give me credit, and oblige. Mr. Bohm is home sick. Mary Bohm." *Held*, that the letter was insufficient, under the statute of frauds, to bind her to the payment of her husband's debt. *Bohm v. Hoffer*, 146.

4. STATUTE OF FRAUDS.—Where plaintiff parted with nothing in consideration of defendant's promise to pay the debt of another; did not surrender the right to enforce its claim against original debtor, or waive any lien upon his property, the promise not being in writing, was within the statute of frauds and void. *Greene v. Latcham*, 416.

SUMMONS:

1. SUMMONS—APPEARANCE.—Defendant was not required to appear and answer the complaint in obedience to a second summons while his motion to quash the first was pending. *Farris v. Walter*, 450.

2. SUMMONS—DEFECTIVE.—Summons which fails to comply with the provision of the Code of 1889, which provides that it shall briefly state the sum of money or other relief demanded in the action, is fatally defective, and motion to quash should be sustained. *Ib.*

3. SUMMONS.—When summons was not issued within thirty days after complaint was filed, the suit was properly dismissed on special appearance of defendant for the purpose of such motion, and the motion was not addressed to the discretion of the court. *Steves v. Carson*, 200.

4. SUMMONS—PUBLICATION.—It is necessary that every material requirement of the statute concerning service of summons by publication be carefully and strictly pursued in order to give the court jurisdiction. *Davis v. The John Mouat L. Co.*, 381.

TAXATION:

1. CONSTITUTIONAL LAW—TAXATION.—The Constitution (art. 10,

sec. 3) requires uniformity of taxation upon valuation. *Denver City Ry. Co. v. Denver*, 34.

2. CONSTITUTIONAL CONSTRUCTION.—A rule or mode of taxation of property having been prescribed by the constitution, all others are thereby excluded. *Ib.*

3. RANGE CATTLE, WHERE RETURNED FOR TAXATION.—It is the duty of the owner of cattle ranging in different counties to make return to the assessor of each county of the number owned by him in such county on the first day of May of each year. In case of his failure so to do, the assessor should assess them, acting on such information as he may possess. *Metcalf v. Fisher*, 375.

4. ERRONEOUS ASSESSMENT, WHO MAY CORRECT.—The board of county commissioners, as a board of equalization, has almost unlimited power to correct errors occurring in assessments either before or after payment of taxes thereon. *Ib.*

TELEGRAPH COMPANY:

1. TELEGRAPH COMPANY, LIABILITY OF.—A telegraph company failing to deliver a telegram is liable for such loss or injury as is the direct, natural and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the message. *Western U. Tel. Co. v. Cornwell*, 491.

2. CONTRIBUTORY NEGLIGENCE.—In order to charge a telegraph company, the loss or injury must be the direct and necessary result of its negligence in transmitting the message, but contributory negligence of the plaintiff may prevent a recovery. *Ib.*

3. DAMAGES.—Speculative, contingent and remote damages, which cannot be directly traced to a breach of contract or negligence on part of the company, cannot be recovered for a failure to deliver the message. *Ib.*

4. NOMINAL DAMAGES.—When the company is not made aware of the purport or importance of a message, and contracts without full knowledge of its importance, and loss is occasioned by failure or negligence of the company in the transmission or delivery, only nominal damage, or the price paid for transmitting the message, can be recovered. *Ib.*

TOWN SITE:

1. OCCUPANTS—TOWN SITES.—The defendant's occupancy of a lot in a town, the site of which had been entered by the county judge under the provisions of sec. 2387, U. S. R. S., having been prior to that of the plaintiff or his grantor, and it not appearing that he had abandoned his claim, *held*, that, as between the parties, his was the better right. *Webber v. Petty*, 63.

2. TOWN SITE—RIGHT OF FIRST OCCUPANT.—It is provided by sec. 15 of the "Town Site Act" (Gen. Stats., sec. 3284), that the person who shall have first acquired the right to the possession or occupancy of the lands in person, by agent, servant or tenant, or those

claiming under him, shall be deemed to have the prior and paramount right. *Rice v. Goodwin*, 267.

3. PRACTICE UNDER THE "TOWN SITE" ACT.—Pleadings and proceedings in actions to determine the right to receive a conveyance under the "Town Site" act are controlled by the chancery practice as modified by that act, and not by the civil code. *Ib.*

4. TOWN SITE PATENT—CONVEYANCE.—When a patent to a town site has been issued to the county judge and his successors, a deed by a commissioner appointed by the municipal authorities passes no title. *Ib.*

TRUSTS AND TRUSTEES:

1. BANKS—TRUST FUNDS.—Moneys deposited or placed in bank for the payment of a draft become trust funds, applicable only to the payment of the bill, cannot be diverted from the purpose to which they were to be applied, and do not lose their character by being commingled with the general deposits. *Hummel v. First Nat. Bank*, 571.

2. SAME—ADMINISTRATOR'S INTEREST IN.—Trust funds in bank may not be diverted to other uses than those designated, do not become the property of the banker, and form no part of his estate. His administrator takes and holds them merely as a bailee. *Ib.*

3. CORPORATE LOANS — MISAPPLICATION. — A misapplication and waste of money received by a corporation is not a ground for invalidating the security upon which the loan was obtained. *Robinson v. Dolores L. & C. Co.*, 17.

4. EVIDENCE—RESULTING TRUST.—Parol evidence is competent to prove a resulting trust. Such a trust must result, if at all, at the instant the deed is taken and the legal title vests in the grantee. *First Nat. Bank v. Campbell*, 271.

5. PROOF, QUANTUM OF. — Unquestionable evidence is required to establish a resulting trust. Whatever is essential to exhibit the equity of the *cestui que trust* must appear in a clear and unclouded light. *First Nat. Bank v. Campbell*, 271.

6. HOLDER OF LEGAL TITLE, WHEN TRUSTEE. — If for any reason recognized by courts of equity as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience and by law, it ought to go to another, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title. *Lee v. The Justice Mining Co.*, 112.

7. SAME.—When a location has been attempted to be made by an alien and his assignee has obtained a receiver's receipt based thereon, one who had made a valid location upon the premises prior to the issuance of the receiver's receipt may invoke the principle above stated for the purpose of acquiring the legal title. *Ib.*

8. TRUST DOES NOT RESULT, WHEN.—No trust can ever result to a

grantor when his conveyance is made for a colorable, illegal or fraudulent purpose. *First Nat. Bank v. Campbell*, 271.

UNRECORDED DEED:

ATTACHING CREDITOR, RIGHTS OF.—A creditor who causes an attachment to be levied on real estate, without notice of an unrecorded deed by the debtor, is entitled to all the protection afforded an innocent purchaser for value. *First Nat. Bank v. Campbell*, 271.

VENDOR AND PURCHASER:

1. VENDOR AND PURCHASER—ABSTRACT—ACTION FOR MONEY PAID.—Where plaintiff agreed to purchase real estate of defendant, paid part of the purchase money and took a receipt therefor, showing that the agreement was that the balance was to be paid on or before a day named, "on delivery of a warranty deed conveying clear title, with abstract," *Held*:

That the plaintiff could insist upon the delivery of an abstract showing clear title as a condition precedent.

That upon default in furnishing such an abstract, the plaintiff had his action for the money paid.

That the defendant could not, in such an action, show as a defense that the defects in the title disclosed by the abstract did not exist, or that his title to the premises was complete and perfect. *Taylor v. Williams*, 559.

2. SECRET LIENS.—A contract providing for a secret lien may be good as between the parties, but is void as against creditors. *Weber v. The Diebold Safe & L. Co.*, 68.

3. CONTRACT OF SALE—RESERVATION OF TITLE.—A provision in a contract of sale that the vendor shall retain the title to the chattels sold until payment of the price is, as against creditors of the vendee, void, when he is invested with possession of the thing sold and the indicia of ownership. Such secret liens are constructively fraudulent as against creditors of the purchaser. *Ib.*

VENUE:

1. DISQUALIFICATION OF JUDGE, WHEN CAUSE FOR CHANGE OF VENUE.—The disqualification of a district judge is never a cause for changing the place of trial, except when a competent judge of another district cannot be procured to appear and try the action. *Smith v. The People*, 99.

2. VENUE—JURISDICTION.—If an action is brought in the wrong county, the court cannot retain jurisdiction after motion in apt time by the defendant to change the place of trial to the county in which it ought to have been commenced. *Ib.*

3. CHANGE OF VENUE A PRIVILEGE—JURISDICTION.—The right to a change of place of trial in an action commenced in the wrong county is a privilege which may be waived, but when properly demanded, it divests the court of jurisdiction to proceed. *Ib.*

4. **VENUE—PRACTICE.**—When an action is commenced in the wrong county the remedy is to apply, upon a showing of cause, for a change of venue. *Com. of Gunnison Co. v. Com. of Saguache Co.*, 412.

5. **VENUE—REAL ACTIONS.**—It is provided by sec. 25 of the Civil Code that an action involving real estate shall be tried in the county in which the land or some part thereof is situate. *Smith v. The People*, 99.

VERDICT:

1. **VERDICT UPON CONFLICTING EVIDENCE.**—The court will not interfere with the verdict when it appears that it was rendered upon conflicting testimony, and it does not appear that the evidence was not fairly considered by the jury. *The Denver, Texas & Fort Worth R. R. Co. v. Richards*, 87.

2. **NEW TRIAL—WHEN GRANTED.**—Where there is no competent evidence upon which a verdict could have been predicated, and where it must have been the result of prejudice, it should be set aside. *The Denver, Texas & Gulf R. R. Co. v. De Graff*, 42.

VESTED RIGHTS:

DITCHES—VESTED RIGHTS.—A ditch for beneficial purposes was constructed across land which at the time was parcel of the public domain of the United States and before the land was included by the city limits, and has been maintained and operated ever since. *Held*, that its owner has a vested right to the use and enjoyment thereof. *The Platte & Denver C. & M. Co. v. Lee*, 184.

WAIVER:

1. **OBJECTIONS—WAIVED.**—Failing to take advantage of such defect, and by pleading to the merits, the defendant will be presumed to have waived his objection. *Morris v. Hanson*, 154.

2. A general agent can waive any conditions inserted in the provisions of a policy of insurance. *Farmers & Merchants Ins. Co. v. Nixon*, 265.

WAREHOUSE RECEIPT:

1. **SALE—WAREHOUSE RECEIPTS.**—Goods or property in store may be transferred by assignment and delivery of the warehouse receipt. *Hill v. Colorado Nat. Bank*, 324.

2. **SAME.**—The assignment and delivery of a warehouse receipt for goods in store, is a constructive delivery of the goods which takes the place of the actual delivery required at common law. *Ib.*

WRIT OF ERROR:

WRIT OF ERROR, WHEN DISMISSED.—It appearing from the record that a demurrer to the complaint had been sustained, but that no judgment had been entered thereon determining the rights of the parties, the court, on its own motion, dismissed the writ of error. *Mowbray v. The Denver & R. G. R. R. Co.*, 128.

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